



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



DL

AP

LV

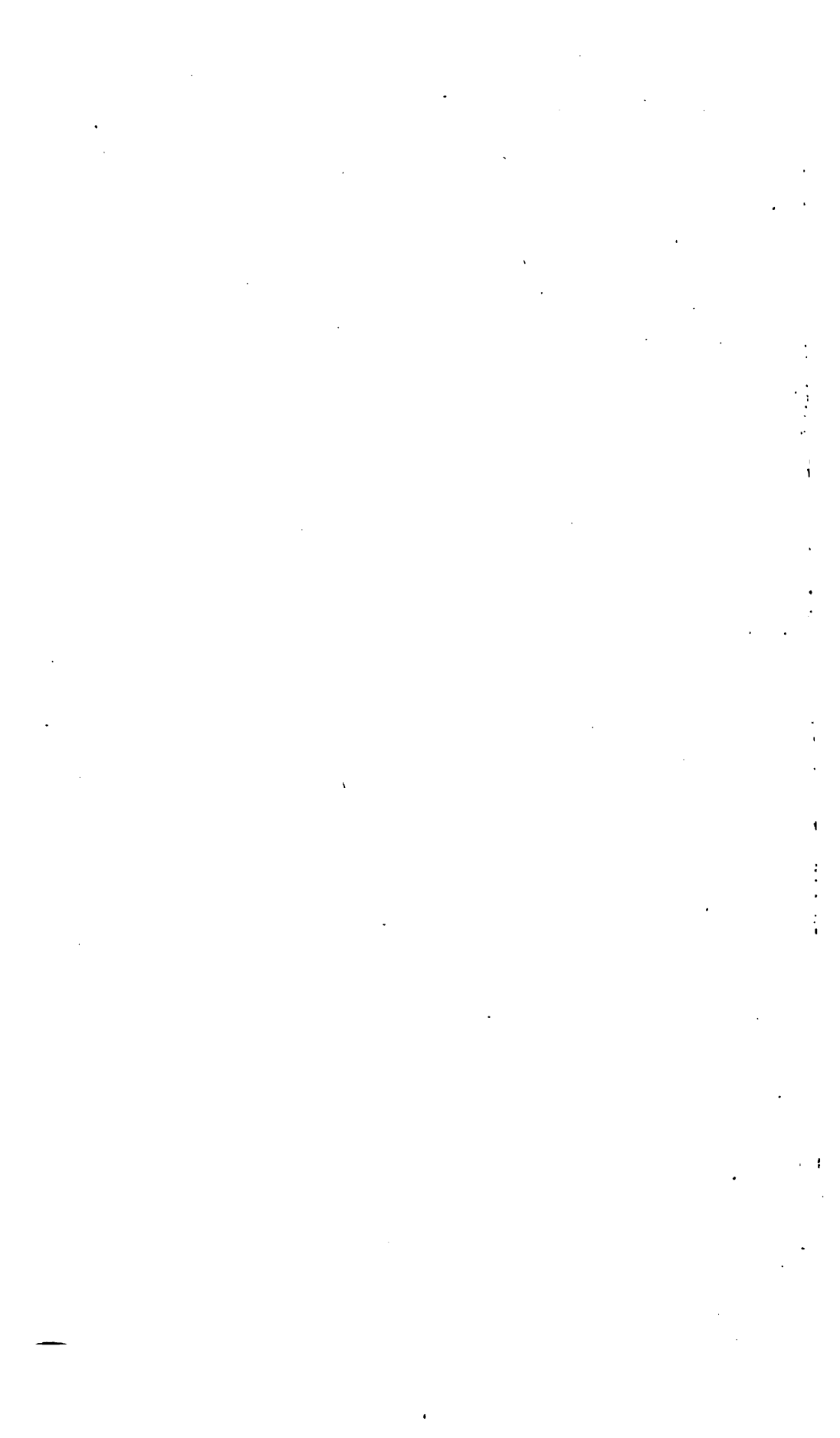
V.?

copy



D:
AP:
LV:
v.2

copy



STANFORD LIBRARY

ELEMENTARY

T R E A T I S E

ON

313

ESTATES;

IN FEE.

IN TAIL.

FOR LIFE.

— AFTER POSSIBILITY OF
ISSUE EXTING.

BY CURTESY.

IN DOWER.

FOR YEARS.

FOR UNCERTAIN INTERESTS

— BY DEVISE.

— BY ELEGIT, &c.

AT WILL.

BY SUFFERANCE.

WITH

Preliminary Observations

ON THE

QUALITY OF ESTATES.

By RICHARD PRESTON, Esq.

BARRISTER AT LAW.

VOL. II.

LONDON:

PRINTED FOR J. & W. T. CLARKE, LAW BOOKSELLERS,
PORTUGAL-STREET, LINCOLN'S-INN.

1827.

YNA 9811.0807472

301750

Luke Hansard & Sons, near Lincoln's-Inn Fields

THIS VOLUME
IS DEDICATED
TO THE
HON. SIR JOHN BAYLEY, KNT.

**ONE OF HIS MAJESTY'S JUSTICES OF
THE COURT OF KING'S BENCH;**

A Judge whose memory will be cherished by all who have had the good fortune to witness his kind attention to the Bar, his extensive knowledge of the Laws, and his unwearied industry and equal temper in administering them ; and by Posterity when they read the acute observations and sound learning contained in the Reports of his judicial opinions.



TABLE OF CONTENTS.

CHAP. V.

	Page.
OF the Language, by which Estates in Fee, ought to be created, or limited, - - - - -	1. 3. 4. 7
By direct Words - - - - -	1
By Words of Reference - - - - -	2
The Grant may be controlled by the Habendum - - -	4
The Grant and Habendum may confer separate Estates	ib.
The Gift to Heirs may be for a limited Interest - -	4. 12
Heirs, a necessary word of limitation in a Deed - -	4. 7
Exception, in case of Rent granted for owelty of Partition, by Coparceners in Fee - - - - -	5- 54
An Estate for Life only passes when the word Heirs is omitted - - - - -	6
Limitation to a Person in his politic capacity, and to his Heirs, passes only a Life Estate - - - - -	ib.
Grant to a Bishop, in Frankalmoign, passes a Fee - -	6. 49
Fee may pass in a Rent, by giving a Life Estate, to the Grantee, with power of Distress to his Heirs - -	8
Grant to a Man and his Heir passes a Life Estate only -	ib.
Also a Grant or Devise to two and Heirs not saying heir	10
Also a Grant to a Man or his Heirs - - - - -	11
Grant of next Presentation. to one and his Heirs - -	12
Heir must be bound to create a Fee in a personal Right or Charge - - - - -	12. 15
The means of transferring the Fee of a Duty or Charge	14
Whether the Charge be an Annuity or Rentcharge -	15
A Corporation may be bound during its continuance, without naming its Successors - - - - -	16. 47
On Limitations to right Heirs - - - - -	17. 18. 19. 20. 22
to right Heirs of two Persons who are living - -	20. 21
who are dead - - - - -	21



DL
APW
LVT
v.2
copy

	Page.
Construction of the word <i>Estate</i> , having reference to the introductory part of a Will - - - - -	110
Heir entitled in Equity to Estate subject to Debts, on intention apparent from a Recital - - - - -	115
Fee may pass notwithstanding a Limitation of the Estate to Executors - - - - -	116
by context, notwithstanding the word Estates may in some degree concern Personal Property - - - - -	ib.
by the word Estate, notwithstanding there be prior Limitations of the Property for Life, or in Tail - - - - -	118
The word Estate may be restricted in its operation, and be descriptive of Locality - - - - -	120. <i>et seq.</i>
The word "Estate," to pass <i>Real Estate</i> , must be unconnected with Personal <i>Property</i> , or must refer to Realty may, from the context, be confined to Personal Property - - - - -	133
or to Chattels Real - - - - -	139-145. <i>et seq.</i>
The Fee may pass by the words Remainder or Reversion by a direction to an Heir at Law, to renounce all his Right to the Devisee - - - - -	143
Construction of the words, all Right, Title, and Interest	151
The word Interest, and its Context - - - - -	153
Inheritance - - - - -	154
Fee-simple - - - - -	155
Property - - - - -	ib.
Effects - - - - -	158
Concerns - - - - -	ib.
Whatsoever else he had not disposed of - - - - -	168
All I am worth, all I have in the world - - - - -	172
The rest I have in the world - - - - -	173
What I die possessed of - - - - -	ib.
Whatsoever else I have in the world not before by me disposed of - - - - -	ib.
What is left - - - - -	174
Any other thing whatsoever or wheresoever - - - - -	ib.
Residue the Testator should die possessed of - - - - -	175

CONTENTS.

ix

	Page.
Construction of the word Substance - - - -	175
Legacy - - - -	ib.
Land - - - -	176
Profits - - - -	ib.
Rents - - - -	ib.
Part, Share and Interest - - - -	177
Quit-rent - - - -	ib.
Hereditaments - - - -	ib.
Freely to be possessed. and enjoyed alike - - - -	178
All to my Mother - - - -	ib.
The overplus of my Estate to be at my Wife's disposal, and make her my Executrix - - - -	178. 180
Lands - - - -	179
Goods, Lands, and Chattels - - - -	ib.
Chattels Real, and Personal Estate - - - -	ib.
Effect of <i>Introductory Clause</i> , in the Construction of Wills - - - -	180
Fee will pass when it is necessary in order that a Trust may be performed, &c. - - - -	207. 241
or a Charge be raised, &c. - - - -	207
The requisites necessary to the Application of this Rule - - - -	231. 242
Devise subject to pay Debts, as distinguished from a De- vise out of Rents and Profits, to pay Debts - - - -	237. 244. <i>et seq.</i>
Where the Devise is subordinate to the Charge - - - -	245
A Fee may arise by mere Implication - - - -	253
The Fee may pass where the Heir is to take in one event only - - - -	271
may pass by a Devise of the Legal Fee, on Trusts - - - -	276
from the Intention, as disclosed by different parts of a Will - - - -	281

CHAP. VII.

Of Conditional Fees - - - -	289
They may exist at the present day - - - -	290. 292
Their properties at Common Law - - - -	296
When absolute - - - -	306
Limited - - - -	ib.
Right of Reverter - - - -	306. 308
Heir how barred - - - -	313

	Page.
Condition, at what time to be performed - -	312
In the form of Limitation may differ from Fee-simple	
Estates - - - - -	313
Of Remainders thereon - - - - -	318
Deductions from the Learning on this subject -	319

CHAP. VIII.

The prominent Authorities on the Learning of Conditional Fees before the Statute of Entails - - -	323
---	-----

CHAP. IX.

Of Estates Tail - - - - -	355
Their Limitation - - - - -	ib.
Duration - - - - -	ib.
Issue in Tail may be barred from inheriting - -	356
Estate may be enlarged by recovery - - -	ib.
Of Attainder of Tenants in Tail - - - -	357
Of inheritable blood of Heirs in Tail, notwithstanding the treason of the Ancestor - -	358
Distinguished from a Determinable Fee 358. 361.	447
Of Limitations to A. and his Heirs of his body, not conferring Estates Tail - - - -	360
Of Estates Tail - - - - -	361. 383. 394
General, as to the Sex, and Special, as to the Person - - - - -	384. 410. 445
Examples - - - - -	412
Qualified - - - - -	361. 383. 395. 400
Determinable - - - - -	362
Converted into Fee-simple, by recovery 362. 452.	460
Of Estates in Rents - - - - -	363
Of its descent when converted into an Estate in Fee	366
Of the different operations of a Fine and Recovery on Estates Tail - - - - -	369. 461
Order of Descent may be changed - - -	371
Of Entails of Copyholds by custom - - -	372
Gift to a man and his Heirs of the body of his Father, or of his Sister - - - -	375. 417
Distinguished from a Gift to the Heirs of the body by purchase, and from a Gift to a Grandfather 375. 386.	391
and his Heirs of the body of his Grandson - -	397
and to a man and his Heirs begotten by his Son -	421

CONTENTS.

xi

	Page.
Heirs in Tail may take by Descent - -	375. 381
by Purchase - -	442. 446
Heirs taking as special occupants - -	375
Of half blood - - - -	375. 398. 421
Of Conveyance by Tenant in Tail - -	376. 382. 462
On Nonclaim - - - -	377
Of the origin of Estates Tail - - - -	ib.
Of customary Heirs in Tail - - - -	383
Devise to a man and his Heirs - - - -	398
In remainder to another - - - -	401
Of Descent in Estates Tail, Special - -	403. 409
Of Heirs of the body taking by Purchase - -	407
Of Gift in Tail, to two persons who are afterwards divorced - - - -	414. 433
To a person and her Heirs, on condition she marries a person of the name of S. - - - -	415
Gift to two persons unmarried, but who may marry, and the Heirs of their bodies - - - -	417. 422
The effect of a fine by one of the Donees - -	423
of a Severance - - - -	424
To A. and the Heirs of B. his deceased wife, and A. never had any Issue by B. - - - -	418
Devise by A. to his Wife and the Heirs of her body by him - - - -	419
Gift to A. and his Heirs of her body, on the bodies of A. and B. - - - -	420
Gift to two who may not intermarry, and the Heirs of their bodies - - - -	425
Gift to two women and the Heirs of their bodies - -	427
To two men and their wives, and the Heirs of their bodies to be begotten between them - -	431. 436
Gift to A. B., husband and wife, and the Heirs of their bodies, when the Marriage of A. B. may be annulled - - - -	433
Of Marriage, whether void or voidable - -	434
Of different Limitations, in Tail, to Husband and Wife - - - -	438. 530
On Heirs being words of Limitation - - - -	441
Of Partition between Tenants in Tail - - - -	445
Of person answering description of Heir in the life-time of his ancestor - - - -	447. 448

	Page.
Heirs to be begotten - - - - -	449
begotten - - - - -	450
Of the History of Estates Tail - - - - -	453
and the difficulties resulting to Titles from the learning of <i>Estails</i> - - - - -	457
CHAP. X.	
Of the different Assurances by Tenants in Tail -	459
Of Fines and Recoveries.	
When either of these Assurances are to be preferred	464
Of their different operations - - - - -	466
Of Lease, Release, Grants, &c. &c.	
CHAP. XI.	
On the Law by which Estates Tail may be created by	
Deed - - - - -	473
by direct Limitation - - - - -	ib.
by Words of Reference - - - - -	474
by Gift, in Free-marriage - - - - -	ib.
arising by implication in Deeds - - - - -	ib.
may be limited by the word "Heir" -	476. 481
Application of the words "Aforesaid" and "Same" -	480
Words of procreation necessary in Limitations of Estates	
Tail - - - - -	481
Must be limited by the word Heirs of the body, or by	
reference to equivalent words - - - - -	481. 534
Examples of Limitations in Tail - - - - -	482. 485. 506
Of a Limitation to A. and his Heirs if he shall have Heirs	
of his body, with or without a Remainder -	503. 520
Grant may be curtailed by the Habendum -	509. 519
by a subsequent Limitation re- ferring to a former Limitation	519. <i>et seq.</i>
Estate Tail may arise either by the Statute of Uses or by	
Common Law - - - - -	516
The Limitation of Use may form part of the Limitation	
of Estate - - - - -	ib.
Limitation and Use may give different Estates -	517
Words limiting a Remainder cannot abridge a prior	
Limitation of Estate cannot confer or enlarge a prior	
Limitation - - - - -	529

CONTENTS.

xiii

	Page.
Construction of words of Limitation not expressly confined to the body of the Donee, - - - -	530
Heirs may or may not be a word of Purchase, where a Life Estate is given to one of the Parents - - -	533
On Estates Tail arising by Will - - - - -	534
Examples - - - - -	537
Distinction between Devise to <i>A.</i> and his Heir Male and a Devise to <i>A.</i> and his Heir Male, and to the Heirs Male of such Heir - - - - -	548
On a Devise to one and his first Son, or eldest Issue Male to <i>A.</i> , and if he died, not having a Son, then over, is an Estate Tail in <i>A.</i> - - -	551
Heir may be a Purchaser, for Life only - - -	552
	554





ESSAY

ON

ESTATES.

CHAPTER V.

On the Language by which Estates in Fee are to be created or limited.

TO the creation or transfer of an estate in fee by deed, it is requisite that the land or other subject of property should be limited, as to individuals, to the individual and his heirs; and, as to sole corporations; as a bishop, parson, vicar, master of an hospital, &c.; to the corporate person and his successors (*a*).

Many exceptions are to be noticed.

Such limitation must be either by express words, as to the heirs in one case, and the successors in the other case; or by words of direct and *immediate* reference (*b*).

Words of direct and immediate reference will suffice.

(*a*) Litt. § 12; 1 Inst. 8 b; 2 Bl. Com. 107; Wright's Ten. 152; 1 Roll. Abr. 832, l. 50; Shep. Touch. 101.

(*b*) Shep. Touch. 101.

The word heirs or successors need not be in the identical deed of grant, or other mode of assurance, by which the estate is granted or conveyed.

Thus, where one to whom lands have been granted in fee does, after reciting the grant, or without any recital, grant the lands to another as fully as they were granted to him (c).

Or, where a man grants two acres to *A* and *B*, to hold one acre to *A* and his heirs, and the other acre to *B*, "in form aforesaid" (d).

Or, where a man seised of lands in fee, enfeoffs another in fee, and continues in possession of the lands, claiming to hold them at the will of the feoffee; and the feoffee enfeoffs the person by whom he was enfeoffed, in these terms: "You have given me these lands (naming them); as fully as you have given them to me, I assure them to you" (e).

In these and the like instances, the fee-simple will pass without any limitation, to the heirs, in express terms. The fee passes by reason of the words of direct and immediate reference. These words are effectual, under the rule, that *verba relata hoc maxime operantur per referentiam, ut in eis in esse videntur* (f).

As often as the estate is to be determinable, qualified or conditional, the words proper and adapted to describe the event on which the

(c) Shep. Touch. 101; Com. Dig. Estate, A. 2.

(d) Shep. Touch. 101; 1 Inst. 9 b.

(e) 39 Ass. 12; 2 Leon. 26; 1 Inst. 9 b.

(f) 1 Inst. 359.

estate is to determine, or be defeated, must be added, so as to express the agreement of the parties. The intention does, in all cases, prescribe the time or event to be designated by these words.

For a long series of years it has been usual, and is the practice at this day, on conveying an estate in fee, to limit the property in which that estate is to be had, to the feoffee or grantee, his heirs and *assigns for ever*.

These words, assigns for ever, are not necessary to the conveyance of an estate in fee; neither of them is material.

The word assigns expresses no other privilege than the law confers on the owner, as entitled to alien or transfer his estate; and the word *for-ever* is merely declaratory of the time for which the subject of the conveyance shall be enjoyed.

Without the word assigns in the limitation, the person to whom the conveyance is made would have the same power of alienation as he may exercise when this word is inserted in the deed of grant; and as the limitation is extended to the heirs generally, without any restriction, by the mention of any particular space of time, to mark the continuance of interest, the feoffee or grantee will have an estate in fee-simple, though the word "for ever" be omitted. And when the word for ever is added, it may be and often is qualified or restricted; without any objection, on the ground of repugnancy.

Thus, under a gift to a man and his *heirs* and assigns for ever; and if he shall die without heirs of his body, then to another person; the donee will, even in a deed, have an estate-tail, and not an estate in fee-simple. So a grant by the premises of a deed to a man and his heirs, *habendum* to him and his heirs for several lives (*g*), gives an interest for the lives only; for the words of the *habendum* are explanatory of the intention, and show, that though the heirs are to be entitled, they are to take for a limited time, and not generally and indefinitely. On the other hand, a grant to a man and his *heirs* of his body, *habendum* to him and his heirs (*h*), gives him several estates; one in tail, the other in fee.

All these and the like cases, of which there are a great variety, are authorities proving no more than that the word heirs may be qualified and explained to mean a limited interest; and that it does not, *ex vi termini*, and in opposition to a manifest intention, import a fee-simple.

The rule in application to deeds is only that a fee cannot be transferred or created without a limitation, in terms, or by reference, to the heirs. No substituted words of perpetuity will, except in special cases, be allowed to supply place.

herefore, a grant in a deed to a man and assigns; or to him and his assigns for ever;

Sken. 44; Wilkins v. Daure, Brownl. 169.

Thurman v. Cooper, Cro. J. 470; Perk. § 170.

or in fee-simple, by that term; or to him and his successors; or so long as the grantor, who has an estate in fee-simple in other lands, his heirs and assigns, shall hold these lands, will not, by reason of the omission of a limitation to the heirs, pass more than an estate for life (*i*).

There is a case (*k*), in which it is reported to have been adjudged, that an estate in fee in a rent passed without the word *heirs*. The case is stated to this effect: "If a man lease a manor for life, and after grant a certain rent to be taken out of the said manor by the hands of the lessee and his assigns, and of others into whose hands soever the said manor shall come: this, it is said, is a good grant in fee, and shall continue after the death of the lessee of the manor."

Certainly there were in this case words sufficiently demonstrating an intention to give a fee. Still the authorities already noticed appear to govern cases of this description, and deny their efficacy, as far as they tend to create a fee.

It is admitted, that on a partition between tenants in fee, a rent granted for owelty of partition may, and in the absence of words of restriction, will, be a rent in fee (*l*).

(*i*) 1 Inst. 9 a; Shep. Touch. 101; Litt. § 1; 1 Inst. 3 b; 2 Bl. Com. 107; Com. Dig. Estate, A. 2.

(*k*) 26 Ass. 126 b, pl. 38; 18 Vin. 472.

(*l*) 1 Inst. 9, 10; Shep. Touch. 101.

The conclusion from a former observation (*m*) on the necessity of words to charge *the heirs*, is, that the grant of a right or duty being a charge on the person, or so far as it is to charge the person, cannot bind the heirs, without words expressly naming them.

Unless they are charged, no fee can be created.

That the grant may give a fee, it must be made by the grantor, for himself and his heirs, to the grantee and his heirs (*n*).

The omission of the word heirs, on the part of the grantor, *in the limitation to the grantee*, will confine the effect of the grant, in its extent, to an interest merely of freehold; and, as it will be insisted on in the chapter on Estates for Life, to an estate for the life of the grantor, and not of the grantee; for as the heirs are not charged so as to give the grantee an estate for his own life absolutely, it is most beneficial to him to have an estate for the life of the grantor.

A limitation to a parson (*o*), in his politic capacity, and his heirs, gives him an estate for life only; on the other hand, a grant to a bishop, or other sole spiritual corporation (*p*), *in frankalmoign*, conveys the fee; for the words, *in frankalmoign*, evince, that the grant is to the bishop, &c. as a corporation, in his corporate capacity; and the words, *in frank-*

(*m*) 1 Vol. 509. (*n*) 1 Inst. 144; Vin. Abr. Annuity, B.

(*o*) 1 Inst. 8 b; 4 Hen. V. 9.

(*p*) 2 Bl. Com. 109; 1 Inst. 10 b.

almoign, do, *ex vi termini*, supply the want of words of limitation; and as often as a limitation is to a natural person, his heirs and successors, or to a person in his corporate capacity, his heirs and successors; the word *successors*, in the former case, and in the latter case the word heirs, is not of any signification. It will be rejected in construction of the deed.

In a limitation to a natural person, the word successors, and in a limitation to a person who is a sole corporation in his politic capacity, the word heirs, will not give an estate in fee. The law rejects the words which are useless; and, once for all, it may be observed, that as the heir succeeds to the ancestor, so does the successor to the predecessor as his heir in his politic capacity (*q*). For this reason, and with the exception already noticed, the word successors is required, in order to the conveyance of an estate in fee to a sole corporation; and the word successor does, with reference to a corporation, perform the like office with the word heirs, as referrible to individuals (*q*).

Nor is it necessary, even in a grant by deed, that the grant should, by one entire or continuous expression, be to the grantee and his heirs. It may be by divided clauses; as to *A* for life, with a remainder to his right heirs (*r*).

It will be sufficient, that it should, from the context, appear that he and his heirs are to have the benefit of the grant. Thus, where a

(*q*) 1 Inst. 8 b.

(*r*) Shep. Touch. 101.

grant was of a rent to *A*, and afterwards, that he and his heirs should distrain for it. This limitation of distress to him and his heirs enlarged the estate, and made it a fee-simple (*s*).

It is also to be observed, that in a gift to a natural person, the limitation, when made by deed, must be to him and *his heirs*, in the plural number, and not to him and his *heir*, in the singular number (*ss*). A grant to a man and *his heir*, by deed, passes an estate for life only.

For an estate by deed to a man and his heir cannot be transmitted in perpetual succession (*t*), because only one representative is expressed.

The heir cannot take by way of remainder, because the limitation is to the heir by a conjunction copulative, and is not limited as in *White v. Collins* (*u*), by way of remainder: nor can he take as joint-tenant with his ancestor, because *nemo est hæres viventis*; and the ancestor cannot take in respect of the limitation to his heir, because the word heir is not used to mark the continuance of the estate in the ancestor. Mr. Serjeant *Hawkins* adds (*v*), in his Abridgment of *Coke on Littleton*, "An estate for life can have continuance only during the life-time of persons who are *in esse*, when the grant is made."

(*s*) Per *Coke*, C. J. 3 Buls. 128.

(*ss*) 1 Inst. 8 b, 22 a.

(*t*) 1 Inst. 8 b; *Gilb. on Uses*, 24; *Gilb. on Tenures*, 254; but see the observation of *Eyre*, C. J. in *Trollop v. Trollop*, Ambl. 457.

(*u*) Com. Rep. 289.

(*v*) Hawk. Abridg. Co. Litt. 12.

The proposition of the Serjeant is not correct. *White v. Collins*, already cited in Chap. 3, on the Rule in *Shelley's Case*, proves, that an heir taking as purchaser, even after the death of the ancestor, may be tenant for life; and the very ground of his taking as purchaser, and the exemption from the rule in *Shelley's case* is, that the gift to the heir is for life only, and not for an estate of inheritance.

When *Hawkins* wrote, an opinion prevailed, that an estate for life could not be limited to a person not *in esse*. That opinion is overruled (*w*).

This opinion originated, in all probability, from the consideration, that an estate granted for lives, must be for lives *in esse*, at the grant, and not for the lives of persons to be ascertained.

The rule does not apply to a grant to a person not *in esse*, by way of remainder; or disqualify him to take an estate merely and simply for his life, either by direct limitation, or by construction of law.

In Mr. *Hargrave's* Annotations on 1 Inst. (*x*) it is said, according to many authorities, *heir* may be *nomen collectivum*, as well in a deed as a will, and operate in both, in the same manner as heirs, in the plural number.

The cases in the margin (*y*) are cited as authorities for this position.

(*w*) 2 Abstr. 166. (*x*) *Ubi supra*, and 2 Woodd. 276.

(*y*) 2 Roll. Abr. 253; 1 Roll. Abr. 832, K. pl. 1. [In this case, which is *Cheek and Day*, the question arose on a will; and

The authority of Mr. *Hargrave* is so highly respected, that the author did not think himself justified to pass over this annotation without notice; but it is submitted, that all those authorities are of gifts in wills and not in deeds. Though the word heir, in the singular number, has in a deed been held to pass the *inheritance*, that instance occurred in the case of a gift in tail, and in tail with a very limited course of descent. It is with great deference, however, that any observations are made, even with the appearance of differing from Mr. *Hargrave*, or of not adopting his opinion.

Also, as often as the limitation is to two persons, it must express whether the heirs are to be of both these persons or of one of them (*z*); and when of one of them only, then also of which of them in particular; as of one in certain, or of the survivor of them, &c. A grant to two men and heirs (*a*), without any specification that the heirs shall be of both persons, or of one of them, is void as to the heirs for *uncertainty*.

As it is not clear whether the law is to appropriate these words of limitation to both the grantees, or to one of them only; and if to

the opinions of *Popham* and *Fenner* were extra-judicial.]—
Amb. 453. *Godbolt*, 155; *T. Jones*, 111; *Cro. Eliz.* 313;
Robinson's Gavellkind, 95, 96; 1 *Burr.* 38; *Vin. Abr.* 10 vol. 233,
K. pl. 1: *Ib.* 8 vol. 233.

(*z*) *Heb.* 94, cites 22 *H. VI.*; *Shep. T.* 101; 1 *Inst.* 8 b.

(*a*) 1 *Inst.* 8 b; 19 *Hen. VI.* 23; 20 *Hen. VI.* 34; *Latch.* 42,
 per *Dodder*, 5 *Rep.* 112; *Shep. Touch.* 19; 37 *Hen. VI.* 5.

one of them only, then to which of them in particular, there is an uncertainty which the law will not supply by construction. And the persons to whom the grant is made, with this uncertainty in the designation of the heirs, will have an estate for life only.

A devise, with the same words of limitation, would give to the devisees the fee jointly.

Also, in *deeds*, the limitation must be to the heirs with the conjunctive *and* (*b*).

A grant to a man *or* his heirs passes a mere estate for life (*c*). It is otherwise in wills; and it is apprehended a grant to a man *and* his heirs *or* assigns is sufficient to convey the fee: since a grant of this description does, in the first instance, clearly extend the gift to the heirs; and the subsequent words in the disjunctive, express the construction of the law, that the grantee, in case he should not choose to transmit the property in succession, may dispose of it by conveyance.

It is not universally true, that a limitation to a man and his *heirs* conveys an estate in fee.

Either from words of qualification, or from the nature and extent of the interest of the grantor, or from the nature of the interest which is granted, an estate for life, or a mere chattel interest, or an estate at will, may pass.

Thus, neither a grant to a man and his heirs

(*b*) 1 Inst. 9 b.

(*c*) See 1 Inst. 9 b; 2 Atk. 645.

for the life of another person, or for years (*d*), or generally, without livery of seisin, or without those other circumstances which may be requisite to the transfer of a freehold interest, will convey a fee.

Neither does a grant to a man and his heirs of the next presentation of an advowson pass the fee of the advowson (*e*). It passes a chattel interest only.

And there is a point already noticed, peculiar to the creation of a fee in rights or duties, which are personal and applicable to those rights or duties, so far only as they are merely personal.

That a grant of this description may create a perpetuity of interest, it must be made by the grantor, *for himself and his heirs*, to the grantee and his *heirs* (*f*). The omission of the word *heirs*, in the clause of grant, on the part of the grantor (*ff*), or in the clause of limitation, on the part of the grantee, will confine the estate to the life of, it is apprehended, the grantor, and not of the grantee. The duty or charge is personal, and the heirs of the grantor will not be bound unless they are charged in their character of *heirs*; and when they are not chargeable, the estate must determine with the life of the grantor; and the grant being of

(*d*) Litt. § 740; Poph. 87. See Buckler's 2 Rep. 55, for a distinction.

(*e*) 10 Vin. Abr. Estate, 9 a, pl. 2.

(*f*) Vin. Abr. Annuity, 505; 1 Inst. 144 b; Brook. Charge, pl. 54; 21 Hen. VII. 1; *Bodvell v. Bodvell*, Cro. Car. 170; 1 Inst. 144 b.

(*ff*) 1 Roll. Abr. 226.

such a nature, that the estate, though limited to the heirs of the grantee, cannot continue beyond the life of the grantor, the estate must take its denomination, in point of quantity, from the extent of the utmost time for which it may have continuance.

The right of charging one individual for his life, (and this is the effect of the grant in point of law,) is of a limited and confined nature; and the interest or estate in that subject, must be as limited and confined as is the subject itself.

The obligation is not to descend on the heirs of the grantor; and therefore the right of charging them cannot exist in the grantee or his heirs.

When the heirs are charged, they are liable so far, and during such time only, as they have assets.

They may continue chargeable for ever; and the duty thus imposed on the ancestor, and on the heirs, may be the subject of perpetual succession; in other words, an hereditament communicating every inheritable quality.

These observations are applicable only to duties chargeable on the person solely, and to those duties only with reference to the original grants of these interests.

Let an annuity be granted by one man for himself and his heirs, to another man and his heirs; and this annuity may, from the inheritable quality annexed to it on its first creation, be granted in fee to another, by words of limi-

tation, to that person and his heirs, without any words to charge the heirs of the grantor or conveying party.

The terms of the first grant communicate to the subject of that grant, a perpetual existence.

To transfer the entire interest and estate in this subject, nothing more is requisite than to add to a grant to the person, to whom the transfer is to be made, words of limitation to the heirs; thus comprising the whole extent of the interest or estate therein.

The words, for himself and his heirs, inserted in such second grant, and in reference to the grantor, would be superfluous. No effect would flow from them; nor could any use be made of them. These terms of obligation are properly used in those instances only, in which a charge is created; and not in those instances in which the right to that charge, as already created, is to be transferred or discharged.

When the person who is the owner of an annuity, which he holds in fee, grants that annuity for himself and *his heirs*, he uses words which are without any application, and consequently meaning.

The annuitant may transfer his annuity, or release the same, without any reference to his heirs; and his heirs will be equally bound by the grant or release, as well when they are not as when they are named (*g*).

(*g*) Vin. Abr. Annuity, B. pl. 1.

It cannot be fairly contended, that a new annuity is created. This would be contrary to the intention. One annuity only is granted. The annuity so granted is the annuity already in existence, and not an annuity to arise from the new grant.

An annual sum granted by one person to another for a continuance of time, will, in some cases, be an annuity or rent-charge depending on circumstances; and, in other cases, will be an annuity or rent-charge at the election of the person to whom the grant is made.

One qualification is to be understood; when an annual sum, granted by one person to another, may be an annuity or rent-charge at the election of the grantee, it is *always esteemed a rent-charge until election shall be made (g)*.

Though the same grant may, at election, pass either an annuity or rent-charge (*h*), yet, taken as a grant of an annuity, it may be sufficient to pass an estate for life only, for want of the words, *for himself and his heirs*, on the part of the grantor, in the clause of grant; while, taken as a grant of a rent-charge, it may, notwithstanding the omission of these words, pass an estate in fee. It is not to be concluded, that the words *for himself and his heirs*, in an original grant of a personal charge, do of themselves, and directly, give continuance

(g) 1 Inst. 144 b; *Fulwood v. Ward*, Poph. 86.

(h) *Bodvell v. Bodvell*, Cro. Car. 170.

to the estate of the grantee. That the grantee's estate may be a fee, it must be extended by a limitation to his own heirs. The word heirs, relatively to him, is indispensably necessary for the purpose.

The word heirs in the clause of grant, and with reference to the person to be charged, is to give continuance to the charge itself, as the subject matter of the grant, by obliging the heirs, to the value of the assets which shall descend to them, to be answerable for the charge.

The grant first creates a charge, and by its obligation on the grantor and his heirs, it is or may be a subject to continue for ever; and then the charge may be limited for an estate in perpetuity.

Grants of annuities by corporations aggregate of many, without words to bind their successors, are not within the reason of grants, by individuals, without words to bind *their heirs* (i); for the corporation, and not the members, are charged by the grant; and the corporation may continue for ever; and for that reason, the annuity will, without any words imposing the obligation on the successors, be a charge during the time expressed by the words of limitation.

Some observations on the extent of gifts in this form, the quantity of time they convey, and the reason of the difference ascribed to

(i) Vin. Abr. Annuity, B. pl. 3.

words of purchase and limitation have been already offered.

Since some notice has in this chapter, and in other parts of this Essay, been taken of limitations to the right heirs as purchasers, it will not, by any means, be foreign, to the design of this Essay, to state the difference of construction which, under different circumstances, is made on gifts to the right heirs as purchasers.

Indeed, the frequent occurrence of limitations to the right heirs, gives this subject a claim to more than ordinary attention (*j*).

The first inquiry is, whether the words right heirs, are words of purchase, or are words of limitation; or are of no avail, as being the old use; or void, as being to the right heirs of the grantor, or of a testator.

When the limitation is to the *right heirs*, *eo nomine*, of a testator, the gift is void, and the fee will descend.

So if the gift be to the right heirs of *A*, (the eldest son, or a particular son, who is the heir, excepted, and notwithstanding a declared intention to exclude him).

The true ground of the case of *Goodtitle* ex dem. *Bailey v. Pugh* (*k*), (the authority in point,) is, that if you exclude the eldest son, the

(*j*) 1 Vol. 116, 290.

(*k*) 3 Brown's Parl. Cas. by Toml. 454; Butler's Fearn, App. 573.

law has not imposed the character of heir, on any other child, and the gift is void for irrelevancy.

So if a conveyance or devise be to uses; or there be a bargain and sale, or covenant to stand seised to uses; and the ultimate use be to the *right heirs* of the settlor (*l*), this use will not be of any avail.

The ultimate fee will be the old use, and descendible, as such, whether the grantor does or does not take an estate of freehold by limitation of use, or by implication (*m*); or although he takes an estate for years.

So if a copyholder make a surrender to uses, and limit the ultimate fee to his right heirs, the limitation will, contrary to the opinion formerly entertained (*n*), be of no effect. The surrenderor will retain his old reversion (*o*).

And if, after a surrender to the use of his will, he devise to his right heirs, *eo nomine*; or, it is apprehended, give the fee to a sole heir by name, the title of the heir or heirs will be by descent, and not by purchase (*p*).

As often as a person does, by a common-law conveyance, grant to his heirs, with the intention

(*l*) *Fenwick v. Mitford*, 1 Leon. 182; *Earl of Bedford's case*, Poph. 3; *Abbot v. Burton*, 11 Mod. 181.

(*m*) *Pybus v. Mitford*, 1 Vent. 372; 1 Vol. 116.

(*n*) *Allen v. Palmer*, 1 Leon. 101; Kitch. 86 a, 88 b.

(*o*) *Noden v. Griffith*, 5 Burr. 1952; *Watk. Copyh.* 96; *Thrustout v. Cunningham*, 2 J. Black. 1046.

(*p*) *Watk. Copyh.* 95, 96, 97.

of making them purchasers, the grant in favour of the heirs is void.

He may, however, grant to the *person* who is, or who may be, his heir: thus, he may grant to his eldest son; or he may grant to the person who, at his death, or at any other time, or on any event, shall answer the description of his heir, or co-heirs (*pp*).

So he may grant to the *right heirs, eo nomine*, of an ancestor.

Whether he himself could be a purchaser under that denomination, in a common-law grant, may be questioned.

On the rule, "*Nemo potest esse agens et ptiens*," it should seem, that he could not, at the common-law, take as a purchaser, under his own grant.

If the estate vested in any other person as purchaser, the grantor might take by descent, through the medium of that grant.

Part of the argument in *Cholmondeley v. Clinton* (*q*), was grounded on a fallacy, in not addressing the argument to the fact, that Lord Orford did not grant to his right heirs, or even the right heirs of an ancestor, through the medium of the rules of the common-law.

He gave to the right heirs of an ancestor, (*Samuel Rolle*); and this gift was of an use, in a conveyance to uses; and a person may, under an use, take as a purchaser, even in a conveyance by himself.

(*pp*) *Blackburn v. Staples*, 2 Ves. & B. 370; *Supra*, 1 vol. 322.

(*q*) 2 Mer. 471; Barn & Ald. 625.

It should therefore seem, first, that a limitation by *A*, to the use of the right heirs of an ancestor, would be good ; and that the grantor himself, being the right heir, might be a purchaser, under that denomination, and as answering that description. A case of this description is not open to the objection arising from the rule, "*Nemo potest esse agens et patiens*;" or, a grantor and grantee ; in other words, a grantor to himself.

When the gift to the right heirs operates by way of limitation to the ancestor, either for a part or the intirety, it is on the ground, that the ancestor has a prior particular estate of freehold ; and cases of that description, with their modifications and exceptions, are noticed in the third chapter.

The remaining point to be examined is, the mode of operation, and the construction and effect of a gift to the *right heirs*, when they are to take as purchasers under that denomination.

In the case of Mr. Justice *Windham* (*r*), it was said, (and this opinion seems to have prevailed) that under a remainder, limited to the right heirs of *I. S.* and *I. N.* who are both living at the time when the gift is made, the heirs shall take severally, though the words are joint. The reason assigned is, that the grant cannot take effect, but at several times ; and this is a decisive reason at the common-law for a tenancy in common.

(*r*) 5 Rep. 8 ; 2 Roll. Abr. 17, pl. 6 ; 1 Inst. 188 a ; 3 Leon. 14 ; 13 Rep. 57 ; 1 Term Rep. 630.

But it should seem, that a gift to the right heirs of two or more persons, being distinct and unmarried persons, who are dead, would be a gift to them as joint-tenants, and *per capita* (according to their number,) and not *per stirpes*, (according to their ancestors or stocks.)

And it is still more clear, that several persons taking by purchase, under a gift to the right heirs of the same ancestor, would take as joint-tenants; although they were related in different degrees, and would, under a descent, take in unequal shares (*s*).

And as often as there is a gift to the right heirs of several persons, and only some of them have a freehold, so as to bring the gift to their right heirs, within the rule in *Shelley's* case, the gift to the right heirs of those persons, to whom no estate of freehold is limited, will be governed by the rules which affect gifts to right heirs as purchasers.

Under a limitation by purchase to the right heirs of two persons who are living, the heirs of each person, as must be concluded from the observations already made, will *take a moiety*. They cannot take as joint-tenants, because they cannot take at one and the same time, so as to have one of those unities (*ss*) essential to a joint-tenancy.

And if several persons, as co-heirs, unite in themselves the description of heirs of one individual, these persons, among themselves, will

(*) *Howell v. E. of Hertford*, 3 Leon. 14. (**) 2 Bl. Com. 181.

be joint-tenants, though, as to the heirs of the other person, they will be tenants in common. They will be joint-tenants, because they take jointly under an entire description, and are capable of taking in an unity of time; for, by the rules of the common-law, they are all ascertainable at the death of the ancestor; and, as will afterwards be noticed, must take at the death of the ancestor, or be excluded.

Persons taking by purchase, under the denomination of heirs, would, by the common-law, retain the estate, although a more immediate heir, or a co-heir (not being *en ventre sa mere*,) should afterwards come *in esse*.

Also, if both the persons should leave co-heirs, the co-heirs of each class would be joint-tenants among themselves; and each class of co-heirs of the two persons will, as against the other class of co-heirs, be tenants in common.

A grant may be to the right heirs of three persons, of whom two are dead, and one is living. No determination which occurs, has settled the quality of the estates, which shall pass by a gift under these circumstances. From principle, it would seem, that the right heirs of the person who is living, would have one third part separately to themselves; and that the heirs of the two deceased persons would be joint-tenants of the remaining two third parts.

Reverse the case, and understand the circumstances to be, that the gift is to the right heirs of two persons who are living, and of one

person who is dead. The deductions from the same principles would lead to the conclusion, that the several heirs of the different persons among themselves collectively, would be tenants in common of their aliquot (*viz.* third) parts, according to the number of the given persons. The heirs of the deceased person cannot be joint-tenants otherwise than among themselves, because there is not any person with whom this relation can stand; they therefore, *ex necessitate rei*, must be tenants in common as to all persons, besides those who, under the description of heirs of their ancestor, take jointly with them.

To carry the supposed case still farther, and illustrate the same by distinctions. Let it be supposed that a grant is to the heirs of four persons, of whom two are living, and two are dead. Under these circumstances, the persons answering the description of the heirs of the two persons who are living, will be tenants in common among themselves; and, it is submitted, that the heirs of the two persons who are dead, will be joint-tenants among themselves; for had the limitation been to the heirs of the two deceased persons distinctly, the heirs would have taken as joint-tenants: and the circumstance, that the limitation is by the same words extended to the heirs of two persons who are living, does not afford any reason for a difference of construction of the gift, as far as it is confined to the heirs of the deceased persons.

Throughout this review of the effect of a limitation to the right heirs, reference is made to those instances alone, in which the right heirs are to take as purchasers, unless it has been otherwise expressed; for it is with a view to those instances only that the questions which have been discussed can arise.

The ground on which it is proposed, that a tenancy in common is created by a limitation to the right heirs of two persons, who are both living, affords the inference, that when the limitation is to the right heirs of several persons who are dead, the heirs shall take as joint-tenants; and it would follow, that taking in this manner, each must have an equal part, without any regard to the stocks or ancestors from whom the several persons derive their pedigree, and with reference to whom the appellation of heirs is used.

In *Roe v. Quartley* (*t*), a devise was to the right heirs of *W* and *M*, who were husband and wife, and both living, and no antecedent estate was limited to either of the ancestors; and it was argued, that the description of right heirs of *W* and *M* must either mean the heirs of the survivor, or give the estate in moieties between the heirs of both; so that the heirs of one of them might take one moiety, and the heirs of the other of them might take the other moiety.

But the Court held, that the devise operated

(*t*) 1 Term Rep. 630.

in the same manner as if it had been to the right *heir of the body of W and M*. They observed, that it was to be collected from *Co. Litt.* 107 (*u*), that a grant to a husband and wife, was not considered in the same light as a grant to other persons; for that if a joint estate was made to husband and wife and a third person, the husband and wife have but one moiety, and the third person would have as much as them both, because the husband and wife are but one person in law, and concluded that if they were but one person, by reason of the relation they stood in, a limitation to their heirs, without any prior limitation to themselves, must naturally mean heirs to them both, according to that relation, which would only be children of them both.

The difference between the several cases is obvious. In the former case, the heirs were to be of distinct persons, and could take only at different times.

In the latter case, they were to be of a husband and wife, who from the social relation in which they stood to each other, were, in law, considered as one person; so that these heirs might take not only at the same time, but as uniting in themselves one entire character, and as answering the collective description of the heirs of both persons.

These cases severally owed their determination to the circumstance, that the limitations to

(*u*) *Supra*, 1 vol. p. 131.

the heirs were independent of, and unconnected with, the limitation of any estate of freehold to their ancestors. If, in either case, a preceding estate of freehold, had been limited to the ancestors jointly, the limitation to the heirs would have conveyed a vested fee-simple to the ancestors as joint-tenants in one case, and in the other case as tenants by intireties (*v*); because the several limitations to the ancestors were both joint, and therefore of the same quality; and the limitation to the heirs was preceded by a gift of an estate of freehold to the ancestors.

Whether under several and distinct limitations, one to the ancestors jointly, the other to the heirs jointly; the fee-simple would be vested in possession, or only in remainder, must depend on the circumstance, whether the several estates are separated by other estates, or are immediately expectant on each other (*w*).

When the estates, passing by several limitations to the ancestor and his heirs, are immediate and expectant on each other, or become so in event, the fee-simple will be vested in possession, unless the limitation to the heirs is to vest on a contingency; and in that case the fee will, till the contingency arises, be in abeyance, as to the person to whom the gift is made.

When an estate is limited between the several estates to the ancestor and his heirs,

(*v*) *Green v. King*, 2 J. Black. 1211.

(*w*) 1 Vol. p. 346.

the fee will not consolidate with, or merge in, the particular estate of the ancestor, till the intervening estate is determined.

Suppose a grant to be to two men, as tenants in common, for their lives, with a mediate or immediate remainder to their right heirs; it would seem, that the grantees would have the fee-simple, as tenants in common (x).

On a grant to one man for his life, remainder to another man for his life, remainder to their right heirs, no decision has been found, to ascertain whether they would be joint-tenants, or tenants in common.

It is, as already shown, the gift of an estate of freehold to the ancestors, which attracts to them the benefit of the limitation to the heirs; and the most reasonable interpretation is, that the limitation to the heirs should give an estate of the same quality as the estate expressly limited to the ancestors; and as each of the ancestors has a several estate of freehold, he would have a several estate of inheritance. *Sed quære.*

Also, when a grant is to one man, for his life, and afterwards to the right heirs of that man, and of another person, not the wife of the grantee, it would seem the limitation to the heirs, will vest the fee-simple of one moiety in the grantee; and the heirs of the other person will have a vested or contingent fee in the other moiety, according to the circum-

(x) Chap. III. p. 341.

stance, that the ancestor of these heirs is dead or living (*y*).

As often as a grant is to a husband or wife, for life, and a remainder is limited to the right heirs of both the husband and wife (*z*), it is a point of some difficulty to ascertain the precise operation and effect of the limitation to the heirs.

There is great reason to conclude that the heirs will take as purchasers; and the case of *Denn v. Gillott* (*a*), seems to be an authority for that conclusion.

In some instances, the word *heirs*, or *heir*, in a gift to them by that name, may be a word of purchase. It receives this construction when the estate is merely for life (*b*); or when words of limitation are superadded, and they alter the nature of the estate imported by the gift to the heirs; so that these words cannot be construed to be of limitation or succession, consistently with the declared intention of the parties. These cases have been noticed in treating of the rule in *Shelley's* case. Also, in a limitation to the heirs, or the *right heirs* of a person: in those instances in which the *heirs* are to take by purchase, the word *heirs*, at the same time that it operates as a word of purchase, has the effect of a word of limitation; describing, *uno flatu*, the persons

(*y*) Chap. III. p. 334.

(*z*) 3 Leon. 4; Fearn, 460.

(*a*) 2 Term Rep. 431.

(*b*) *White v. Collins*, Com. Rep. 289.

who are to take, and the quantity of the interest or time they are to have.

When a gift to the right heirs, as purchasers, was made, either by conveyance at common-law, by limitation of use, or by devise, and the ancestor died, leaving a daughter, and after the death of the father, a son was born; yet the estate vested in the daughter, and was not divested by the subsequent birth of the son (*c*). The title of the daughter was complete on the death of her father (*d*). She alone answered the description at that time, and no subsequent change in the circumstances of the family of her father would divest her right thus acquired (*e*). The same point was law, as between an uncle, or any other collateral relation, and his nephew or niece, &c. when the limitation was to the right heirs as *purchasers*, and the person to whose heirs the limitation was made, died before the birth of the person who, if *in esse*, would have been heir.

The position respecting purchasers, was, at the common-law, generally introduced as a contrast to a descent from a brother to a brother, or any other collateral relation, and the subsequent birth of a child who eventually became the nearer heir of the person from whom the title is derived (*f*).

(*c*) 1 Rep. 101 a; 3 Rep. 6 b; 9 H. VII. 25.

(*d*) 1 Inst. 11 b. n. 4; Harg. Co. 369, note; 3 Atk. 204.

(*e*) *Basset v. Basset*, 3 Atk. 203.

(*f*) *Goodtitle v. Newman*, 3 Wils. 516; 1 Rep. 101 a; 3 Atk. 203; 3 Rep. 62.

On a descent, the title of the uncle, or other collateral relation, will be defeated; and the estate will vest in the child immediately on its birth; but the heir for the time being may retain the rents which he receives (*g*); and the parson whom he presents to a church on an avoidance in his time, will be duly presented.

Mr. *Watkins*, in his Essay on Descents (*h*), adopting the opinion of Mr. Justice *Ashurst* (*i*), has expressed a doubt, whether the statute of 10 & 11 Will. & Mary, c. 16, has not altered the law on this point.

This statute is of a limited extent. It adopts the rule, that a child *en ventre sa mere* (*j*), is to be considered as a child *in esse*; so that a remainder shall not fail, or a more remote remainder be accelerated, merely because the object does not come *in esse*, in the life-time of the parent.

The statute is applicable between parent and child, and perhaps as between a class of persons, in the instance of a gift to right heirs; for, as to *right heirs*, it is observable, that the child, as between whom and an heir *in esse*, the question must arise, must be *en ventre sa mere*, at the death of the parent.

It may be objected, that neither the statute nor any decisions on it governs this case, since it is a case for which the common-law had provided.

(*g*) *Bassett v. Bassett*, 3 Atk. 204; 9 H. VI. 25 a; 3 Wils. 596, 527.

(*h*) P. 210, 3d edit.

(*i*) 1 Term Rep. 634.

(*j*) *Doe v. Clarke*, 2 H. Bl. 399.

Although the lands be of customary tenure, the right heirs designate the common-law heir as purchaser; and the estate will vest in the common-law heir, to be transmissible from him, as the first purchaser, to the heirs according to the custom; unless the special heir be designated (*k*).

On the same ground, the common-law heir must enter under a condition annexed to a grant in fee; although, after his entry, the customary heir, as being the owner of right, may enter on him (*l*).

A gift to the right heirs of an alien, as purchasers is void in its inception (*m*); the law will not expect his ability to have heirs.

A gift to the right heirs of a denizen or bastard would be good.

And a *remainder* to the right heirs of a person who is attainted, may, it should seem, be good; viz. to vest, if there should be heirs before the determination of the particular estate; and to fail of effect, unless the capacity of being heirs should, by the restoration of inheritable blood, be complete, during the particular estate (*n*).

Cholmondeley v. Clinton has decided, as far as the opinion of Sir *W. Grant* and three Judges of the King's Bench, against *Bailey, J.* has settled the point; that, under a limitation to the use of the right heirs of *Samuel Rolle*, the

(*k*) 1 Vol. p. 449, 463.

(*l*) 1 Inst. 12 b; Watk. Desc. 3d edit. §68.

(*m*) The authority is mislaid.

(*n*) 1 Keb. 349.

ancestor of the settlor, the fee vested in Lord *Orford*, the grantor. The defendant did not deny that this was the primary construction of the language. There was a context, on which an argument for a construction, which should suspend the ascertainment of the heir, and consequently the vesting of the interest, until the determination of the prior estates, was grounded.

When there is a gift to right heirs as purchasers, and some of the persons who would be heirs are attainted, and others not, then these distinctions occur.

By the common-law, no person being attainted, or the descendant from a person being attainted, could, while the attainder remained in force, take by purchase, or descent, in the name or character of *heir (o)*. He might be a *grantee* by any other description or character, but an attainted person could take as a grantee only for the benefit of the Crown (*oo*), while his heir might, by any other name than heir, be a grantee for his own benefit (*p*).

By a late statute (54 Geo. III. c. 145,) it was wisely and humanely enacted, that no attainder for felony which should take place from and after the passing of that Act, (27th July 1814) save and except in cases of the crime of high treason, or of the crimes of petit treason or murder, or of abetting, procuring, or counselling the same, should extend to the

(o) Bro. Descent, pl. 59.

(oo) 1 Inst. 2 b; Jenk. Cent. 283. (p) 3 Abstr. 396.

disinheriting of any heir, nor to the prejudice of the right or title of any person or persons, other than the right or title of the offender or offenders, during his her or their natural lives only; and that it should be lawful to every person or persons, to whom the right or interest of any lands, tenements or hereditaments, after the death of any such offender or offenders, should or might have appertained, if no such attainder had been, to enter into the same.

It will be among the gratifications of the author, to have been selected by that great man, *Sir Samuel Romilly*, the promoter of this law, to second his motion on this important subject.

Lord Coke observes (*q*), there is a diversity between a descent, which is an act of law, and a purchase, which is the act of the party.

For if a man be seised of lands in fee, and hath issue two daughters, and one of the daughters is attainted of felony; the father dieth; both daughters being alive, the one moiety shall descend to the one daughter, and the other moiety shall escheat.

But if a man make a lease for life, the remainder to the right heirs of *A*, being dead, who hath issue two daughters, whereof the one is attainted of felony; in this case, some have said, the remainder is not good for a moiety, but void for the whole; for that both the daughters should have been (as *Littleton* saith,) but one heir.

(*q*) 1 Inst. 163 b; Ch. J. *Eyre's* opinion, *Beaumont's Peerage*, 3 Cru. Dig. 225.

This proposition is preceded by the observation, that *omnes simul et in solidum hæredes, sunt: plures cohæredes, sunt quasi unum corpus, propter unitatem juris, quod habent* (r). Again, albeit where there be parceners, they have moieties in the lands descended to them, yet are they but one heir, and one of them is not the moiety of an heir, but both of them are but *unus hæres*.

In a former passage, Lord Coke had observed (s), "If a man hath issue, two daughters, and dieth seised of two acres of land in fee-simple, and the one coparcener giveth her part to her sister, and to the heirs of the body of her father; in this case, the donee hath an estate-tail in the moiety of the donor's part; for the donee is not entire heir, but the donor is heir with the donee; and she cannot give to the heirs of her own body; and the donee hath the other moiety of her sister's part for life."

In this instance, the words heirs of the body, were words of purchase, and the grantor, as being one of the heirs of the body, could not take by the rules of the common-law under her own grant; and as the other sister was only half an heir, she could not take the intirety.

And one of two co-heirs to a peerage is not entitled to be a peer, as sole heir, merely because the other co-heir is attainted (t).

Whether the observations on the gift to the heirs of the body be consistent with the doubt in 1 Inst. 163 b, may be questioned.

(r) 1 Inst. 163 b.

(s) Ib. 26 b.

(t) Beaumont's Peerage, Eyre's MSS. 3 Cru. Dig. 225.

Had the gift been in a limitation of use, the grantor might have taken, as one of the *co-heirs*.

Bacon, in his Abridgment (*u*), has not adverted to the possibility, that a remainder to the right heirs of a person who is attainted, may become capable of effect by the reversal of the attainder, and the restitution of inheritable blood, prior to the determination of the particular estate.

Although a gift to a man and his heirs on the part of his mother, or other like form, cannot accomplish the desired order of succession; yet a gift to the heirs on the part of the mother, as purchasers, would be a good designation; and the heirs on the part of the mother, or other class of designated heirs, would be entitled as purchasers. The order of descent, however, from the first purchaser, would be in the usual and regular order of succession.

It is in many cases of importance, and even necessary, to decide, whether a limitation to the right heirs, as purchasers, shall give a *vested* or *contingent* interest.

A limitation to the right heirs of a person who is living, must wait for effect till the death of the ancestor.

Till that event, the heir cannot be ascertained. The rule is, "*Nemo est hares viventis*;"—no one answers the description of *heir* to a person who is alive.

(u) Remainder, C.

A person who is dead may have heirs ; that is, persons answering the description of *heirs* : so that the persons who are the heirs are ascertainable ; and consequently they may take a vested interest by the name and in the character of right heirs.

The exceptions to the existence of *heirs*, are, as to the persons who, from crime and attainder, (as felons, traitors, &c.) or who from rules of policy, (as aliens, &c.) do not communicate inheritable blood.

On this subject, the more prominent points have been already noticed.

Blackstone, in his Commentaries (*v*), will afford complete and detailed information.

But, though a gift to right heirs may, and in ordinary cases, does, confer a vested interest, as soon as the heirs are, in consequence of the death of the ancestor, ascertainable ; or as soon as the impediment arising from corruption of blood be removed ; yet a gift to the right heirs may also, from the circumstances of the gift, and the context of the deed, &c. be *contingent* ; as being in effect a gift to heirs, to be ascertained at a remote period ; if such be the intention clearly and manifestly expressed.

Philips v. Deakin (*w*), afterwards noticed, affords a principle on which this conclusion may be bottomed.

Also, a gift to the right heirs of a person who was attainted, might, at the common-law,

(*v*) 2 Vol. chap. 15.

(*w*) 1 Mau. & Sel. 744.

have been contingent, and suspended of effect, till the impediment of corruption of blood was removed. It could, however, have been good only as a remainder expectant on a particular estate of freehold. Consequently, it would fail of effect, unless it could vest during one of the particular estates by which it was supported; or in that instant in which the particular estate, or the last of the particular estates, determined.

As an executory devise, a springing or shifting use, a gift of this description would have been too remote, from the indefiniteness of the period, at which it might confer a vested interest.

And as often as the limitation to the right heirs is, in effect, the old reversion, the interest will of necessity be vested, without regard to the language or terms in which the limitation to the right heirs is made.

And although the testator has limited the fee to his right heirs, after several particular estates, it will be a gift to his right heirs, ascertainable at his death, and as such be void.

In *Doe lessee of the Earl and Countess of Cholmondeley v. Masey* (x), the testator devised all his real estate, except at S, to the head of his family for life, and then to several of the junior branches, in succession, to each for life, with remainder to his first and other sons in tail male, with the ultimate remainder to his own right heirs; and then devised his estate at S, to some, by name, of the junior

(x) 12 East, 589.

branches, but not to all of those to whom he had devised the first estate, and varying the order of succession, to each for life, with remainder to his first and other sons in tail male; and then devised, that, "for default of such issue," the estate at *S* should go "to such person and persons, and for such estate and estates, as should *at that time*," (i. e. on the death of the last tenant for life named, without issue male,) "and from time to time afterwards be entitled to the rest of his real estate *by virtue of and under his will*." And the Court held, that the ultimate remainder in fee of the estate at *S*, vested by *descent* in the person who was *the testator's heir at the time of his death*, and did not remain in contingency under the will, till the death, without issue male, of the last tenant for life, who was named in the devise of that estate.

This case is stated from the marginal note of the report. The reader is advised to study the case in the report.

This case supports the doctrine in *Cholmondeley v. Clinton* (*y*); except so far as the context in that case ought to have influenced the decision.

As far as the context could influence the decision, *Philips v. Deakin* (*z*), approximates as an authority to support the opinion of Mr. Justice *Bailey*, against the other opinions certified in *Cholmondeley v. Clinton*.

(*y*) 2 Mer. 171; 2 Barn. & Ald. 625.

(*z*) 1 Mau. & Sel. 744.

In *Philips v. Deakin* (a), the Court decided, that the limitations were contingent, and suspended till the prior particular estates should be determined ; because, after a gift of particular estates, created by the same will, *T. Vernon* had devised, in these words : “ And for default
“ of such issue, to such of the uses, for such
“ of the intents and purposes, and under and
“ subject to such of the limitations, powers,
“ provisoes, conditions, and agreements mentioned and declared in and by the said will
“ of my late cousin, *Thomas Vernon*, as shall
“ be then existing, undetermined, or capable
“ of taking effect, or as near thereto as the
“ deaths of parties, and other intervening
“ accidents and contingencies, and the rules of
“ law and equity, will then admit of.”

Indeed it is clear a testator may, in express terms, or by the arrangement, and consequently the plan, and sound exposition of his will, suspend the vesting of a gift to his right heirs ; and it would seem to follow, that persons taking under this designation, might take by purchase. The gift would be in effect, as it might be in terms, to the persons who, at a *given*

(a) 1 Mau. & Sel. 744.

time, should answer the description of right heirs (*b*).

Till the interest should vest under the gift, the fee would descend to the heir, *pro tempore*; leaving it open to doubt, whether, if the fee should eventually, under the will, give the estate to a person who was the sole heir at the death of the testator, he would not, in this single, solitary instance, be entitled by descent as his *better* title. Strong arguments might be adduced against his taking by descent, notwithstanding the rule which favors the right of an heir to take by descent as his better title, when he might take, either by gift or by descent, the same estate. The absence of the unity of time, for vesting, seems to decide, that the title is by purchase. *Sed quære*.

In the recent case of *Doe d. King v. Frost* (*c*), the devise was in these terms: "I give and bequeath to my well-beloved son *William Frost*, of the parish of *Brinkley* and county of *Cambridge*, farmer, and his heirs for ever, all my houses and lands, with all their appurtenances thereunto belonging; also, I give to my well-beloved wife, *Rebecca Frost*, the sum of 100*l.* of good and lawful money, yearly and every

(*b*) *Swaine v. Burton*, 15 Ves. 365.

(*c*) K.B. 2d May 1820.

year, during her natural life, to be paid her by the aforesaid *William Frost*, half-yearly, out of the estate; and if the said *William Frost* should have no children, child, or issue, the said estate is, on the decease of the said *William Frost*, to become the property of the heir at law; subject to such legacies as the said *William Frost* may leave by will to any of the younger branches of the family." And on a special verdict, the Court of King's Bench decided,

1st, That the son had a fee, subject to a limitation over by executory devise, and not an estate-tail:

2dly, That the limitation over was to the person who should be the heir of the testator at the death of the son, without leaving issue, and not to the testator's immediate heir; so as to be part of the old reversion by descent to the heir: and

3dly, The Court intimated an opinion, that the son might charge this substituted fee with legacies, according to the declared intention of the testator.

The like doctrine is to be found in *Marsh*

against *Marsh (ca)*. In that case, the testator ordered "the residue of his personal estate to be laid out in the purchase of stock ; and that the trustees should pay the interest, &c. to his son, *Wm. Warren*, for life ; and from and after his decease, to his eldest son and his heirs for ever ; and in case of their death, without issue, unto his (the testator's) nearest relation, and to the nearest relation (heirs of such nearest relation) for ever."

At the time of making the will, the testator lived separate from his wife. He had only one son, who was unmarried (and who afterwards died in the life of his father) ; he had a half-sister, the plaintiff ; and there were also alive children of a deceased half-brother, who, with the testator's widow, were the present defendants.

And it was decided by the Lords Commissioners, that "the testator did not mean to restrain the interest of any one but his son : if the son had a son, that son would have taken the whole from his birth. It is a clear double contingency ; one way good, the other not so. Upon the decease of *William Warren*, without issue, the remainder over was good. There

was no affectation of a perpetuity. The devise is, 'To my nearest relation, and the nearest relation of my nearest relation.' The nearest relation at the time was the half-sister. If there had been more persons in the same degree, there must have been a division, because each would have been nearest relation."

And according to Sir *Samuel Romilly's* note, Lord *Loughborough* added, "The testator certainly meant, that the nearest relation at the time of the decease of the son (cb), should take the property, not the nearest at his own decease. To suppose he meant a reversion to his son, is impossible; and his widow clearly has no title. The surviving sister is alone entitled."

In *Philips v. Deakin*, all the gifts, had they been substantive and independent of prior particular estates, created by the same will, would have been too remote and void, as gifts to objects not ascertainable until the failure of the issue of persons to whom estates-tail had been given. *Lady Lanesborough v. Fox* (cc), completely negatives the validity of such gifts,

(cb) See *Doe v. Lawson*, 3 East, 278; *Holloway v. Holloway*, 5 Ves. 399; *Sparks v. Sparks*, Cro. Eliz. 666; *Cranmer's case*, Dyer, 309 a; Bac. Abr. Remainder C; *Perrinan v. Peirse*, Palm. 204, 203.

(cc) Cas. temp. Talb. 262. Chap. III.

through the medium of executory devises; the only mode in which they would be capable of operation, since no vested freehold would have passed by the will. It would not have been an answer to the objection, that the gift was of a *reversion* (*d*); nor, that there were prior existing estates-tail under a former gift. The existence of prior estates-tail relieves a case of this difficulty, in those instances only in which the estate-tail is given by the same deed or will which limits the executory devise, shifting use, &c. (*e*); and then so far only as the executory devise or shifting use is subordinate to the estate-tail (*f*).

So if the ultimate use be limited to the right heirs of another person than the grantor; and if the grantor become heir of that person, it would seem that the fee, thus vested in the grantor, would be held by purchase, and would displace the fee which he took by resulting use. The decision in *Doe v. White* (*g*), leads to this result.

(*d*) See Chap. III.

(*e*) 1 Abstr. 131; 2 Abstr. 157.

(*f*) *Nichols v. Sheffield*, 2 Bro. C. C. 215.

(*g*) 15 East, 174.

The rule requiring the designation in terms, or by reference, of heirs in the limitation of estates in fee, is confined to common-law assurances; to assurances which pass an estate by conveyances in the country; or, as they are usually styled, conveyances *in pais*; and to these assurances only, when they are to *natural persons*, and not when they are to corporations aggregate of many, or even to sole corporations; or by assurances by matter of record; or which have their operation in extinguishing a right, or a *collateral interest*; or give one interest in lieu of another; or release the unity of title; or confer an equitable interest, properly called a *trust*, by way of contract, as distinguished from a conveyance; or, as to some manors, an interest in lands held by copy of court *roll*; or wills.

It follows, there are a great variety of instances to which the rule does not extend; instances which are not within the scope of the rule, or of the policy of the law, which was the groundwork of the rule.

These instances have the appearance of exceptions to the rule. In reality, they are not within its compass. The cases, it is true, are

exceptions to the reason of the rule ; and, considered in this light, they arise,

1st, Some instances, from the nature of the objects to whom the assurance is made, and the peculiar rights in which they take ; as corporations aggregate, &c. :

2dly, Other instances, from the nature of the assurance by which the property is conveyed ; as by fine, or recovery :

3dly, Other instances, from the particular and relative situation in which the parties stand to each other ; as joint-tenants, coparceners, persons having a mere right or collateral interest in the land ; or taking an interest of one sort in lieu of an interest of another sort :

4thly, Contracts in equity, or trusts declared of an estate on the conveyance thereof : and,

5thly, and lastly, From that indulgence which, in construing wills, is allowed to the intention of testators, as often as the intention can be collected from the language in which the will is expressed.

A body corporate, aggregate of many persons capable, and to be continued by succession; as a mayor and commonalty (*h*); will take an estate in fee, although no words of limitation are added in the grant to them, extending, in terms, the benefit of the grant to the successors; while, in grants to corporations sole, the word successors must be used in most instances, and with very few exceptions; as equivalent to the word *heirs*, in a gift to a natural person.

The notion of the perpetuity of a corporation aggregate of many persons, by continual succession (*i*), induced *Finch*, in his Description of the Common-Law (*j*), and also *Sheppard*, in his Touchstone of Assurances (*k*), to advance, with a reference to 21 Edw. IV. 61 (*l*), as an authority in point, that they should have an estate in fee, although the limitation is to them *for their lives*; and *Finch* adds (*m*), that colour, in an action of trespass, shall not be given to such a corporation by a lease for life; for being a body politic, which never dies, *they may not have such estate*.

If by *their lives*, the lives of the corporation are to be intended, then the point turns on the

(*h*) 2 Bl. Com. 108; 1 Inst. 8 b; 94 b; 11 Hen. IV. 84 b; 11 Hen. VII. 12; Perk. § 240.

(*i*) Kitch. 300; 1 Bl. Com. 484; 2 Bl. Com. 109.

(*j*) Page 128.

(*k*) Page 101.

(*l*) In Perk. § 240, it is 22 Edw. IV. 38.

(*m*) Page 128.

conclusion, that, by the lives of the corporation, the continuance of the corporation is marked, and then there is not any limit to the estate.

The case to which reference is made by *Finch*, has not been found; and the law is not correctly stated without the qualification which is added.

The cases to be suggested as in point, are reconciled, by stating the law to be, that when lands are granted to a body corporate aggregate of many, and no words of limitation are added to restrain the gift to some determinate time; in that case, as also when words of perpetuity or succession are added, the corporation will take an estate in fee.

Since, in the former case, the grant is to the corporation, and no definite time is marked for the duration of the estate, the estate will subsist, as long as the corporation shall have continuance; and this period is, in contemplation of law, for ever (*n*).

In the latter case, as words of express limitation are used, no ground for doubt could exist.

When words of limitation are added, and they are restrictive of the implication and construction of law; or rather preclude a construction by implication, by expressly confining the duration of the estate to a number of years in certain; or to the lives of all and every, or any or either of the persons of which the corporation is composed; or of any other persons; or to

(*n*) 1 Inst. 9 b.

any other limited period allowed by law, in reference to a gift to individuals, then the limitation will have that effect only which would be allowed to it in grants to individuals; and, consequently, will restrain the grant in its extent, to that period of time, or event, which the limitation has marked.

The positions in *Bacon's Abridgment*, are agreeable to these observations; for it is there laid down (o), "If a lease be made to a corporation aggregate, for life of the lessor, this is a good estate *for life*; because the life of the lessor, which is wearing, and will determine, is the measure of its continuance."

This book also notices the distinction arising from a lease to a corporation aggregate, for *their own* lives (p); drawing the conclusion, that it is no estate for life, but a fee-simple.

By *their own lives*, he means the *life*, or political existence, of the corporation. This conclusion is evident, from the reasons which are assigned; for he adds, the lease being made to them as a body politic, which has a continual succession, and never dies, a lease made to them during their lives, is equal to a grant made to them, while they continue a body politic, which, by reason of the perpetual succession of its members, is in law looked upon to be for ever; and therefore this is a good gift in fee, without the word successors, because the lessor cannot have the land till the

(o) 2 Bac. Abr. 271; Roll. Abr. 843.

(p) Perk. § 240.

corporation is dissolved; for, till their dissolution, they are in being, and have a continuance (*q*), which is to be alive, within the words of the lease.

In *Bellamy's case* (*r*), it was also taken for granted, that a corporation may have an estate, *pur autre vie*; that is, an estate for the life of any individual.

It is to be observed, that a corporation aggregate of many persons, whether they be all capable, or capable only by means of one person, may take a chattel estate in succession; and that, with the exception, perhaps, of the chamberlain of London (*s*), an interest of this quality may not be taken in succession, by a corporation merely sole, as a bishop, chantry priest, or by a parson *quatenus* bishop, chantry priest or parson (*t*).

An estate in fee is taken by a corporation aggregate of many persons, by construction of law (*u*), on a mere grant to the corporation, without any words to extend the grant, in terms, to the successors, merely and simply because the grant is to the corporate body; and that body may have perpetual continuance.

As no words of limitation are added to restrain the grant to any determinate point of time, or possible event, the corporation will have the property, which is the subject of the

(*q*) 21 Edw. IV. 76.

(*r*) 6 Rep. 38 b; 3 P. W. 406.

(*s*) 4 Rep. 65; Com. Dig. London, g.

(*t*) 1 Inst. 8 b, 9 a, 46 b; Hob. 64.

(*u*) 1 Bac. Abr. 506; Perk. § 240.

grant, as long as it may, and this is for ever; because that grant may have that effect, consistently with the words by which it is made, and because it does not appear that the contrary was intended (*v*); and for the same reason, as a gift to a man, without any words to extend the ownership to his heirs, or confine it to any particular time, conveys an estate for life.

The legal notion of the continuance of the body corporate by succession, is equivalent to words limiting a fee-simple in terms; for an estate which, from its extent, considered with reference to its continuance, embraces the infinity of space, from the nature and relative situation of the proprietors of that estate, must be of the same extent, as an estate which is to have the like continuance, by the express contract and stipulation of the parties.

Under the same reasoning, a grant by a corporation to an individual and his heirs, of an annuity or other personal duty, will give perpetual continuance to such annuity or personal duty, though the corporation do not, in express words, impose the obligation on their successors.

A *sole corporation* also may take an estate in fee, without any words of limitation or succession, in those instances in which the grant is to the corporation, by its corporate or collective name; and not merely by that term or appellation which, in common acceptation, applies to

the individual in whose person the character of the corporate capacity is fulfilled.

Thus a gift *ecclesiæ de A*, (the church of *A*) will pass a fee, though the deed of gift do not contain any words of succession (*x*).

The case is stated in these terms: "If land be given by these words, *dedit et concessit ecclesiæ* of a place in certain, the parson and his successors shall be inheritable by that name."

So will a gift to a bishop, *in libera eleemosina* (*y*), or to the king (*z*).

But a gift to the parson of *A* by that name, or by his name of *B*, parson of *A*, without any words of limitation, is merely an estate for life (*a*).

It has been already noticed, that a grant to a parson *quatenus* parson and his heirs, will not convey the fee, for want of the word successors; nor will a gift by deed, to an individual and his successors, pass the fee, for want of the word heirs (*b*).

In the idea of a church, as a corporate body, the perpetuity and succession of the corporation, distinguished in law by that denomination, is included; on the other hand, the term parson does not import any idea which may not be applied to the person of the parson in his individual capacity, without any reference to his

(*x*) 11 H. IV. 84 b; Shep. Touch. 101; 1 Atk. 437. According to Bridgman 105, this was the case of a devise, he cites 21 Rich. II. Dev. 17.

(*y*) 1 Inst. 9 b.

(*z*) Ibid.

(*a*) 1 Inst. 8 b; Bro. Abr. Mortmain, pl. 3.

(*b*) Cro. Eliz. 633; 1 Inst. 8 b.

successor or his corporate function; unless the manner in which he is to take, as in *frankalmoign*, be expressed, and the purposes of the grant demonstrate that he is to have the estate in his politic capacity.

The case, already stated, of a gift *ecclesiæ*, was recognized by Lord *Hardwicke* (*d*), and treated as of authority; for on a devise in these words, "I give unto the *Latin school*, if any man is possessed of it, that teacheth boys, and is richly grounded in the Latin tongue, the sum of five pounds, to be paid him yearly, for teaching and instructing three boys;" Lord *Hardwicke*, who on the construction of several parts of the will, held, that this five pounds was a rent charge, said, "I am of opinion that it was intended by the testator as a perpetuity; for he did not give it to a particular schoolmaster, but to the *school itself*; which is like the old case of a gift to the parish church of *Saint Andrew, Holborn*, which was construed to be a gift to the parson and parishioners of *Saint Andrew*, and their "successors for ever;" and he also held, that the clause for the instruction of three boys, must be understood to mean three boys in succession.

A grant to an ecclesiastical person to hold in *frankalmoign*, without any words of perpetuity, passes the fee (*e*); because the manner in which the parson is to take, and the pur-

(*d*) *Cheesman v. Partridge*, 1 Atk. 436.

(*e*) 1 Inst. 94 b.

poses of the grant clearly show that he is to take the estate in his politic capacity; and taking in this right, and as a corporation to be continued by succession, he will have an estate transmissible to his successors, and consequently the fee.

A gift to the *King* (*f*), though a sole corporation, passes the fee, without any words to limit the estate to his successors; on the common received notion, that the King may not take, in any other right, than of his crown.

This case has its particular circumstances; for the gift must be understood to be to the King, in his politic capacity; and then, as the King never dies, and there is a perpetual continuance of that office, there is ground to contend that the gift to the King is virtually, and in substance, a gift to him and his successors.

And there is a peculiarity belonging to grants in fee to corporations.

Although the grants pass the fee and confer the right of aliening the fee-simple, yet should the corporation be dissolved, while the corporation retains the fee, the reverter would be to the grantor or his heirs, and not to the lord by way of escheat (*g*).

But the corporation may alien the fee-simple, and defeat this possibility of the reverter of the grantor. The possibility of reverter is in the

(*f*) 1 Inst. 9 b.; Shep. Touch. 97; 1 Bl. Com. 249; 2 Bl. Com. 109; 6 Rep. 17.

(*g*) 1 Inst. 13 b; 1 Abstr. 272.

nature of an escheat; and it is to the grantor and his heirs, and not to the lord, since the lord can never take by escheat, except on a failure of heirs.

And on a conveyance by fine, *come ceo*, or *de droit*, or by a common recovery (*h*), in the case of a fine, the conusee, or person to whom the fine is levied; and in the case of a recovery, the demandant or recoveror, *i. e.* the person to whom the recovery is suffered, will have an estate in fee, without any words of limitation.

When the intention is to pass a particular estate, words of express and restrictive limitation may be added in fines, and will be effectual for the purpose.

A fine, *come ceo* (*i*), as a common assurance, supposes a precedent agreement to make a feoffment; being an assurance, which, if carried into execution, without restrictive words of limitation, would convey the fee; or as is more probable, it is evidence of a feoffment already made; which, in supposition of law, actually conveyed an estate of this quantity.

It is, on this account, sufficient, for the purpose of the conusee, to lay the foundation of

(*h*) 1 Inst. 9 b; 2 Bl. Com. 108; Shep. Touch. 19; *Frederick v. Wakefield*, Tr. 36 Eliz. C. B.

(*i*) 2 Bl. Com. 348; Shep. Touch. 1, 4; 19 Hen. VI. 17 b; 1 Inst. 9 b, 50; but see 1 Salk. 339.

his title to the fee, that this agreement or conveyance is recognized, and the evidence of it entered on record.

Unless this be the supposition on which the law proceeds, and unless the conjectures offered on this head be well founded, to what purpose is the release to the conusee and his heirs in the conclusion of the concord? For a release to the heirs in extinguishment of a right, or confirmation of a title (and this is the operation to which this clause is directed) cannot have any effect, unless the positions, already advanced, be allowed to be of weight.

A fine, *sur conusance de droit* (j), may also pass the fee, without any words of limitation, when no words of restriction are inserted; and when the person levying the fine has a right, in point of estate, to convey an interest of that extent.

And, in application both to fines, *de droit come ceo*, and *de droit tantum*, it must be understood, that restrictive words of limitation will have the effect of the intention with which they are inserted (k).

For it would be absurd, that either of these fines should pass a greater estate than the parties had expressly limited; and on the subject of the fine, *sur conusance de droit come ceo*, it has also been said, that it may be supposed that the donation or feoffment, of which an

(j) Shep. Touch. 4; Co. Read. 7.

(k) *Hunt v. Bourne*, 1 Salk. 340.

acknowledgment is made in the fine, was for life, or in tail, as in fee.

Also, a *common recovery* has in all its forms, and in every process towards its completion, the semblance of an action founded on title in the person by whom it is agreed that the lands should be recovered.

The recovery is suffered by default in those, by whom the title might be maintained, on the ground of their right. The person, who recovers, is, by fiction of law, supposed to be restored to a seisin or estate, which had been wrongfully wrested out of his tenancy, and injuriously withheld from him. The nature of the writ in which he states his right to recover, supposes him to have been disseised, and to have had an estate in fee before that wrong was committed. Therefore, the demandant will, on his recovery, and by the continuance of the fiction under which he is allowed to have judgment in his favour, be considered to have the land, according to his antient title, and to the extent of his former estate. In judgment of law, this estate is a fee-simple (1).

Recoveries suffered by tenant in tail are used to *enlarge* the estate-tail into a fee-simple. The descendible qualities of that fee are deserving of notice. As far as the law applies to the effect of the recovery, the recoveror acquires a complete fee-simple, descendible to all his heirs, without any restriction or exclusion,

(1) 1 Inst. 9 b; 2 Bl. Com. 108, 357.

provided the donor of the estate-tail had a fee-simple (*m*).

But recoveries are generally suffered to uses, and the uses are declared in favor of the owner of the estate-tail, as enlarged into a fee-simple. In equity, before the statute of 27 Hen. VIII. c. 10, this use would, in point of title, have been governed by the old dominion; and the heirs to the land, when the same was held for the legal estate, were in equity preferred in the right of succession to the use.

This was a consequence of the equitable administration of justice in the Court of Chancery, when uses were fiduciary, and subject to the peculiar jurisdiction of that Court. The courts of law, in deciding on similar declarations of use, when the use is executed into estate by the Statute of Uses, adopted (in truth the Statute of Uses prescribed to them) the principle of these decisions of equity. The cases in the margin (*n*) are authorities for this point.

Also, a yearly sum allotted on a partition of land between coparceners in fee (*o*), to either of them for equality of partition, will be a charge on the land, and held in fee, although no

(*m*) 1 Convey. 1, 2, 3.

(*n*) 1 Inst. 13 a, 23 a; *Fenwick v. Mitford*, 1 Leon. 182; 11 Mod. 181; *Roe ex dem. Crome v. Baldwre*, 5 Term Rep. 104; *Martin v. Strachan*, 1 Wils. 2, 66; *Abbot v. Burton*, 2 Salk. 590.

(*o*) 1 Inst. 10 a; 29 Ass. 23; 15 Hen. VII. 14; Plow. 134 b; 10 Vin. Abr. 2 a, 4; *Geffe v. Haywood*, Roll. Rep. 370.

words of limitation be added to the terms of the grant.

The estate in the rent comes in lieu of an estate in a portion of the land. This portion of land was held in fee. The estate in the rent will be of the same quantity, in point of interest, as the estate in the land, for which, to a certain degree, it is a recompence or compensation. *Ipsæ etenim leges cupiunt ut jure regantur*, is a rule applicable to cases of this sort.

It remains a question open for determination (*p*), whether a grant of rent, on a partition between joint-tenants, or tenants in common in fee, in order to the equality of a partition between them, should receive the like determination.

A case with these circumstances seems entitled to an equal liberality of construction, now that joint-tenants and tenants in common, as well as coparceners, are compellable to make partition.

Also, on a partition between joint-tenants in fee, tenants in common in fee, by *writ*; or between coparceners, either by *writ* or *agreement*, not being an actual conveyance; each tenant will have a several estate in fee, in the teppements allotted to him for his share.

Before partition, each of them has, in the land, a common right to the possession. The partition destroys the common right to the

(*p*) 1 Leon. 127, per Periam, J.

possession, and in lieu of that right, assigns to each a distinct interest in a separate part of the land; and, on partition, each will have, in his separate part, the like estate as he had in the land; that is, an estate in fee. The distinct right, which each takes in his separate part, comes in lieu of the common right, which he had in the whole. For this reason, his estate in the separate and distinct part, will be of the same quantity and extent, as the estate which he had in all, or any part, of the land.

Rents granted on exchange, and on partitions by deed, between joint-tenants or tenants in common, are, in some particulars, within the reason of this rule. However, they do not receive the same construction.

So a release by one coparcener to another coparcener (*q*), whether they have equal or unequal shares; or to one of several *coparceners*; or by one joint-tenant in fee to his companion; or to one of several companions (*r*); or to a husband or wife, when they are tenants by intireties, as between themselves, and joint-tenants with the releasor (*s*), of the entire estate in the tenancy, *of all his right*, without any words of limitation; will pass as ample an estate as the person who makes, and the person who accepts, the release, have, as to joint-tenants in joint-tenancy, and as to coparceners in coparcenary.

(*q*) Litt. § 384; 1 Inst. 9 b, 193; Dyer, 263 a; 19 H. VI. 19 a, 22 a; 1 Inst. 273 b.

(*r*) 1 Inst. 273 b.

(*s*) Ibid.

Releases by these persons, without any qualification, have, properly speaking, and according to the construction of law, the effect of transmitting to the other joint-tenants or coparceners that common right to the possession, or that unity of seisin, which is in the person who makes the release.

This is a construction from the mode of assurance which the parties have adopted, and the unlimited extent of that assurance; and the construction is applied as between joint-tenants and tenants in coparcenary, although one of three or more joint-tenants or coparceners release to one other and not to all the others of them; so that the releasor claims in the *per*; or, in other words through the medium of the assurance of his companion, as a conveyance or transfer of seisin or title, and not a release of a right to the possession or unity of title.

There are other assurances, (as lease, &c.) by which one joint-tenant or coparcener might give an exclusive right to his companion *for a particular time*, without parting with his whole estate or participation in the seisin (*t*).

A release by one joint-tenant or coparcener, to his companion, may, with proper words of limitation, be used as an assurance, to give a right of exclusive enjoyment for a particular period. When the assurance by release is adopted, and no limited time is expressed to

(*t*) 1 Inst. 193 a.

show an intention to circumscribe the continuance of the estate, then, from the mode of assurance, and the generality of the expression, the law infers an intention in the releasor, not to retain any part of his estate or ownership; and avails itself of the generality of the release, to give to the person to whom the release is made, an exclusive title to the seisin, &c. as against the releasor.

This doctrine has not any application to tenants in common, nor to a *deed* of confirmation made by one joint-tenant or coparcener to the other of them (*u*).

Also, assurances operating *by release of right* to land, in extinguishment of the right (*v*), and not in the creation or transfer of an estate, or to enlarge one; whether such release be made to the person who has the fee, or who has only a particular estate of freehold (*x*): also, releases of interests issuing out of and being collateral to land, as rents, commons, &c. when these releases are made to the person who is the owner of the fee of the land, or even an estate of freehold in the land; and also confirmations when they are made of the estate of persons already owners of an estate in fee; have the effect, in the first and third instances, to pass the right to the fee; and in the second instance, to extinguish the right to an interest held for an

(*u*) Litt. § 523; 1 Inst. 298 b.

(*v*) 1 Inst. 9 b, 280 a, 297; Litt. § 519, 521.

(*x*) Litt. § 521.

estate in fee, though the assurance do not contain any words of limitation to the heirs: and when it happens that such release of right or title is made to the tenant of a particular estate of freehold, the benefit of that release may be claimed by the persons in reversion or remainder; also, when such release is made to the person in reversion or remainder, the tenant of a particular estate will have the advantage of the release (*y*).

In the second instance, words of express limitation (*z*) to pass the rent, for a limited time, would restrain the operation of the assurance to that particular period. But every estate of freehold is entire, and is confirmed, notwithstanding a declared intention to confirm, for a less period; as for life, or in tail (*a*), when there is a larger estate in the confirmee.

In these instances, the assurances have the effect of conveying or releasing the fee in the collateral interest; or of giving an indefeasible right to the fee, as against the person who makes the confirmation, and his heirs. Other assurances, adapted to the purpose of conveying a particular estate, in the collateral interest, might have been used, unless the parties intended that their assurance should have that effect, which the law, under such circumstances, ascribes to a general release.

(*y*) 1 Inst. 453 b.

(*x*) See the reasons in 1 Inst. 296 b, 297 a.

(*a*) Litt. § 519, 520; 1 Inst. 314; Shep. Touch. 85, 86.

This appears to be the ground on which the law infers an intention to pass the fee.

Although words of qualification be added in releases of the *mere right* (*b*), or confirmations of titles to an estate of freehold (*c*), with an intention to confine the operation of that instrument to a particular time; as a day, a month, or any other given space; yet the conclusion of law is in direct opposition to that very equitable rule of construction, which requires an observance of the intention of the parties, and renders words of limitation nugatory.

The law deems the release of a *mere right* for an instant, equal to a release of that right to a man and his heirs for ever. In point of law, the right is an entire collective thing. The release of a right implies a release of all remedies to pursue the right. Of consequence, the estate of the possessor becomes indefeasible. The law would ascribe the same effect, although the release (as a release) were of the land. In those instances in which the right is not to be totally extinguished, but the interest of the tenant of a particular estate (*d*), is to be rendered indefeasible, a confirmation is the proper mode of assurance. But a confirmation of an estate in *remainder*, or a *reversion*, would confirm the *prior* particular estates (*e*); still, however, there may be a confirmation of part of the time of a term of years (*f*).

(*b*) Litt. § 467. (*c*) Ib. 519, 520. (*d*) 1 Inst. 397 a.

(*e*) 1 Inst. 297 a; Litt. § 525. (*f*) 1 Inst. 297 a.

It must be observed, that the person who hath an estate to him and his heirs, is personally, and in his own right, the proprietor of the land, and the owner of the whole estate.

Though the estate may devolve on his heirs after his death, yet, during his lifetime, he is owner of the entire fee, and not of an interest for his life only.

The land, and the estate in the land, are wholly in his power. They are the property of himself alone.

From the connection between the owners of the land, and the burthens imposed on the land, and also from the relative situation of those who have the estates, and those who have a right to the land, a confirmation to the owners of the estate has the effect of rendering the estate indefeasible; and a release of an incorporeal hereditament has the effect to exonerate the estate from the charge.

This result may be described to be the operation of an instrument from privity of person connected in privity of estate or right; a learning of some nicety, intimately blended with deductions from feudal policy. Releases of the mere right to the freeholder, or to the tenant of the fee, are to be referred, in some degree, to the same relation, or more properly speaking, to a privity in *point of right*.

In this last case, in particular, the release is a release of a right to bring an action to disturb

the present owners, rather than a release of the estate.

On this ground, the freeholder, and the reversioner, and remainder-man, may mutually avail themselves of a release to each other (*g*). When the release is made, no estate exists in the releasor. His release is of his remedy; and a right once released, is released for ever (*h*), while a confirmation may be of a particular estate (*i*).

A right is an entire thing; and, considered as a right of action, is, with a view to continuity of time, indivisible. Hence the determination, that a release of a mere right for a day or an hour, is a release for ever.

Let it be however remembered (*k*), that a release to a *tenant for life*, of all the right of the releasor, *when the releasor has an estate in the land*, and the release is without any words of limitation to the heirs, will not give to the releasee a more ample estate than for his life, though the releasor has an estate in fee-simple.

The cases of releases by one joint-tenant or coparcener to another, and of releases of collateral interests, are generally stated, as if the words of the deed were, *all my right*, or the like collective expression; but it is understood, that these words are not by any means necessary, they are expressed in our books,

(*g*) 1 Inst. 453 b.

(*i*) Litt. § 521.

(*h*) Litt. § 467.

(*k*) Ibid. 546.

and inserted in the assurances in which they are used, as a practical caution, to show that the release is not for a particular time, and by way of confirmation, lease, &c. &c.

A release by one joint-tenant or coparcener to another *for life*, would operate as a lease for life.

So would a release of a rent-charge, &c. for life. But a release of right cannot be for a day, or for life, &c.

Another instance of an exception to the general rule, noticed by Lord *Coke*, is the creation of a peerage by writ. It has been allowed in a variety of instances. At the same time it must be observed, that Mr. *Prynne*, a learned antiquary and great lawyer, has controverted and denied the conclusion.

The point most material to the subject of this Essay, is, that a fee, in the most extensive signification of the word, cannot be created in a title of dignity, either by writ or patent, with or without words naming the heirs. Every dignity created in favor of a man and his heirs, is, in consideration of law, a dignity in him and the heirs of his body only; consequently, the person in whom the dignity is created, has in the same a fee, in the nature of an estate-tail; in other words, to him and the heirs of his body, and not to his heirs generally; consequently, the persons who are in the collateral line to those in whose person the dignity of blood and nobility commences, are not inherit-

able to the dignity. In this respect, there is a difference as to dignities by tenure annexed to the ownership of land.

There are only a few instances of this dignity by tenure.

The barony of *Arundel* is of this description.

Under baronial dignities, the right of nobility followed the right of ownership to the land: even the assignee became a peer.

These baronies were strictly feudal.

Trusts have a peculiarity.

The general rule is, that limitations of trust are to be construed in like manner, and by the like rules, as limitations of a legal estate (1); and therefore, in deeds, the fee cannot pass by grant or transfer, *inter vivos*, without appropriate words of inheritance.

But in contracts to convey, and in trusts declared in a conveyance, the fee may pass, notwithstanding the omission of a limitation to the heirs.

Therefore, articles to convey to *A B* in fee; or a conveyance to *A B* and his heirs, in trust, to convey to *C D*, in fee-simple, would confer a right in equity, to call for a conveyance of the inheritance. So a conveyance to *A* and his heirs in trust, *totidem verbis*, for *B* in fee, would pass a fee.

So there may be a right in equity to call for a conveyance of the fee, because there is

(1) 3 Ves. jun. 127.

evidence of an intention to convey the fee, although that intention be not expressed by a limitation to the heirs.

The result of the general rule is, that a bargain and sale by an equitable owner to *A* simply, would pass no more than an estate for life; while, if it should appear from a recital, that there was an intention to sell the fee, the Court would consider the fee to pass.

So if the bargain and sale were to *A for ever*; or in any other terms which expressed the intention of selling the fee, a Court of Equity would, in cases which justified the interposition of equity, supply the defect; being the absence of formal words of limitation to the heirs.

All the books are agreed, that equity would supply an omission of words of inheritance (*i*); and equity will act on the omission, in an equitable bargain and sale, in like manner as it would supply a defect in a conveyance of the legal estate, on evidence, that the contract was for the fee, while the words of inheritance are omitted.

The general rule is borrowed from the doctrine of the courts of law, subsequent to the Statute of Uses, as distinguished from their doctrine prior to the statute.

Prior to the Statute of Uses, the fee would have passed by a bargain and sale, without a limitation to the heirs (*k*).

(*i*) Com. Dig. Chancery, 2 T. 1.

(*k*) 4 Edw. VI. Estates, 78, cited 3 Rep. 21; 10 Vin. 234; 1 Rep. 87, 100 b; 8 Rep. 94 a; 1 Inst. 10; Dyer, 169; Shep. Touch. 225.

After the statute, and by a departure from the principle of that statute, the courts of *law* decided, that the fee would not pass without proper words of limitation.

Courts of equity followed the rule introduced by courts of law ; still, however, retaining their jurisdiction of supplying defects or omissions in conveyances, when it could find grounds, from the language in the contract of the parties, to supply the defect or omission.

It has been said, that as the statute now executes the use, and the bargainee has a legal estate, the same construction must be made, as to this legal estate, under the statute, as was made on gifts of estates at the common-law.

For this conclusion, no well-founded reason can be urged. The construction of law on the bargain and sale ought to have been precisely the same, after the statute, as the construction of the Court of Chancery would have been when uses were fiduciary, and were under the immediate and peculiar jurisdiction of that Court. That construction seems to have been expressly directed by the very letter of the Statute of Uses. In other respects, the Courts have attended to the words of the Act. They have allowed, that under the equity which that statute introduced into the law on estates, arising from limitations of uses (*l*), a tenancy

(*l*) Cox's P. W. 14 ; *Rigden v. Vallier*, 2 Ves. sen. 252 ; 3 Atk. 731 ; *Goodtitle v. Stokes*, 1 Wils. 341 ; *Stone v. Heartley*, 1 Ves. sen. 165.

in common, may be created by words which, in the case of a limitation of the legal estate, by a conveyance at common-law, would not have the same effect.

That this construction of the courts of law, which requires words of express limitation in bargains and sales, is agreeable to the Statute of Uses, is one question: whether any convenience results from its adoption, now that the rule is established, is another question.

Every person who has had an opportunity of observing the salutary effects flowing from a rule, which prescribes, that certain technical words only should have a particular signification and import, will congratulate the profession, and those in whose interest and peace he takes any concern, that the rule is adopted.

And it is not always requisite, that the word heirs should be used to pass the fee of copyhold lands (*m*).

The general rule seems to render it necessary that this word should be inserted (*n*), unless some other term, sanctioned by usage, and grown into custom, has been substituted in its place.

By custom, a grant of a copyhold to a man and his (*sibi et suis*), or to him and his assigns (*sibi et assignatis*), or to him without any

(*m*) 4 Rep. 29 b; Comyns' Dig. Copyholds, f. 8; Kitch. 102 b.

(*n*) Watk. Copyh. 108; Roll. Abr. 839, l. 50.

other word, may give the inheritance (o). This form of expression as already stated, would not give more than an estate for life, in a grant of lands of freehold tenure.

CHAPTER VI.

As to Wills.

In Wills, a fee may pass without any words of limitation to the heirs, as often as it can, by any means, be clearly collected, that it was the intention of the testator to give an interest of this extent.

In the construction of wills, the testator is supposed to have wanted that professional assistance, of which a party to a deed may always avail himself (a). The law, therefore, regards the intention, more than the precise legal import of the words in which the testator has expressed his meaning (b); and as often as it can be collected, from any circumstance in a will (c); or from the whole will taken together, and applied to the subject matter, be

(o) Watk. Copyh. 109; 1 Roll. Abr. 48.

(a) Tr. on Eq. 59, § 2; 2 Eun. 47; Latch. 42, per Dodderidge.

(b) Per Lord Mansfield, in *Loveacres v. Blight*, Cowp. 352.

(c) *Bowes v. Blackett*, Cowp. 235.

reasonably inferred; that the testator intended to pass all his estate in his property, that estate will pass, though the property be not limited to the heirs of the person to whom the devise is made.

This is rather a rule of construction on the intention, than a rule of positive law. As it will always happen, under rules of this sort, the cases are various. They admit of an arrangement into classes.

The general rule of law, for the construction, as well of the language of a will, as of a deed, is, that when there are not any words (*d*), in express terms, or of necessary implication, to give continuance to the estate after the death of the person who is to take under the limitation, the devisee shall have merely an estate for life (*e*).

Whoever would claim a fee under a devise, is bound to show that there is some language in the will, to carry more than an estate for life. As in other instances, the rule is, that the heir at law of the testator will have a title, till it can be shown that his title has been defeated; for an heir at law is not to be considered as disinherited, without adequate expression.

(*d*) *Thompson v. Lawley*, 2 New Rep. 303.

(*e*) *Bowes v. Blackett*, Cowp. 235; *Cook's case*, *Dixon's case*, both cited Latch. 36, and 136, by the name of *Dixon and Marsh*, and *Erasmus Cook's case*; *Merson v. Blackmore*, 2 Atk. 341; *Middleton v. Swain*, Skin. 339; 8 Vin. 237; *Roe ex dem. Kirby v. Holmes*, 2 Wils. 80; *Doe v. Fyldes*, Cowp. 833.

The only difference in the application of the rule is, that in deeds, the intention must be expressed in certain technical terms, to which alone the law has annexed a certain precise and definite meaning ; and in wills, the intention may be collected from any expression, or from any circumstances, which lead to the inference, that the continuance of the interest, or time, which is given, is not to be measured or circumscribed by the life of the person to whom the devise is made.

An estate in fee, agreeable to the notion entertained of that estate at this day, is, as has already been shown, an interest of a nature, extent, and quality, to continue beyond the life of the owner. It will enable him to dispose of the property, either for ever, or for any space of time, and in any manner allowed by law. This disposition may be under any modification he pleases, so as he does not suffer his will to contravene the rules of law ; and so as he does not direct that to be done, (as in the instance of perpetuities) which, from motives of policy, the law has denied him the power of accomplishing.

Such is the nature of an estate in fee ; and as often as, either from a present or remote view, it appears to be the intention of the testator, that the person who is the object of his bounty, should have the property for an estate, which will confer these powers and this dominion, an estate in fee will pass.

In determining cases of this sort, the Courts have uniformly decided, that the following circumstances, as to the cases to which they respectively apply; and unless there be some expression to explain the sense in which the terms are used by the testator; are a sufficient declaration of an intention to pass the fee.

1st, That the testator has, in direct terms (*f*), expressed an intention, that the devisee shall,

1. Have the land *for ever*; or,
2. Have the power, in point of estate, over the fee; or,
3. That his estate in the land shall not determine at his death, nor be confined to his issue; for a gift confined to the issue, would be an estate-tail; or,
4. Where the objects of the devise are *named by a term*, which refers to them in a particular character, as having a *perpetual continuance*.

2dly, That the terms, in which the testator has expressed his will, do, in common acceptance, import a gift of all his interest, in point of estate.

(*f*) Tr. on Eq. 59, § 2.

3dly,

1. That the purpose of a trust he has created, or any other purpose he has expressed, cannot be certainly performed; or,
2. An act he has directed to be done, cannot, certainly and effectually, be accomplished; or,
3. A charge he has imposed, cannot be sustained;

unless it be determined, that an estate in fee is devised (*g*).

4thly, That the person in whose favor the devise is expressed, is made *personally* liable to the payment of a sum in gross, or an annual sum; and no estate is expressly limited to him; and he may receive a prejudice, and sustain some loss, unless it be held, that he take an estate in fee.

5thly, That the estate of the devisee is not to determine, merely and simply on his death; but on an event connected with his death; and leading to the conclusion, that he is not to have an estate for life only (*h*).

Trust estates, as well as legal interests, are

(*g*) Tr. on Eq. 59, § 2; *Chapman v. Blissett*, Cas. temp. Talb. 150; 1 Ves. 491; 3 Burr. 1686; *Doe v. Fyldes*, Cowp. 833.

(*h*) *Frogmorton v. Holliday*, 3 Burr. 1618; *Doe v. Cundall*, 5 East, 400.

equally within the scope of these five several classes.

There is a sixth class of cases, and they afford a rule peculiar to trust estates; thus,

6thly, When the legal estate is devised in fee, and there is an apparent intention, that all the beneficial interest of that estate should belong to a particular person, or to a class or description of persons, although in the devise to them of the trust, or beneficial ownership, there are not any words of limitation, the fee of the trust will pass.

As to the cases falling under the *first general head*;—

A devise,

1. To a man *for-ever* (*i*);
2. To a man and his assigns *for-ever* (*k*);
3. To a man *in fee-simple* (*l*);
4. To a person and *his heirs*, for their lives;
5. To a man; and

(*i*) *Whiting and Wilkings*, 1 Bulst. 219; 1 Inst. 9 b; 2 Bl. Com. 108; Gilb. on Dev. 19; 8 Vin. Abr. 206, pl. 6; 2 Lord Raym. 1152; 1 Bro. Ch. Ca. 147; 1 Roll. Abr. 834.

(*k*) 1 Inst. 9 b; 2 Bl. Com. 108; Gilb. on Dev. 19; 8 Vin. Abr. 206, pl. 9; 1 Roll. Abr. 834.

(*l*) Gilb. on Dev. 18; 8 Vin. Abr. 206, pl. 8; 2 Bl. Com. 108; Perk. § 557.

1. *To his successors* (*o*) ;
2. *To his executors* ;
3. *His blood* (*p*) ; his family (*q*) ; his house (*r*) ; his stock (*r*) ;
4. *His heir*, in the singular number (*s*) ;
5. *Or his heirs* (*t*) ;
6. And *his* (*u*) ;
6. To a man, and to *his*, and to do what he will with it (*x*) ;

As to the sixth general head (*y*) :—

A devise to a man,

1. To give, sell, or do therewith, at his pleasure (*z*) ; or
2. To dispose thereof, at his pleasure (*a*) ;
To sell and dispose, for payment of debts (*b*) ;

(*o*) *Webb and Herring*, Roll. Rep. 399 ; Moore, 853, pl. 1164 ; 3 Bulstr. 194 ; Gilb. on Dev. 19 ; 8 Vin. Abr. 209, M. A. pl. 1.

(*p*) *Downhall and Catesby*, Moore, 356 ; 1 Inst. 9 b ; 8 Vin. Abr. 206, pl. 10 ; Gilb. on Dev. 19.

(*q*) *Wright v. Atkins*, 17 Ves. 257.

(*r*) *Dyer*, 333 b ; Hob. 33.

(*s*) 1 Roll. Abr. 833, 836 ; Skin. 5, 563 ; Annesley's Rep. 161 ; Gilb. on Dev. 20 ; Gilb. on Uses, 24 ; 1 Vent. 215.

(*t*) 2 Atk. 645.

(*u*) Gilb. on Dev. 19 ; and Latch. 36.

(*x*) 24 H. VIII. Latch. 36.

(*y*) 19 H. VIII. 96, and 6 Edw. VI. 38, cited Bridg. 105 ; Broke, Dev. 38, 39 ; Latch. 135.

(*z*) Broke, Dev. pl. 39 ; *Whiskon and Cleyton's case*, 1 Leon. 156 ; 8 Vin. 234 ; *Goodtitle v. Otway*, 2 Wils. 6.

(*a*) *Jennor and Hardie's case*, 1 Leon. 283.

(*b*) 8 Vin. Abr. 236.

To dispose at will and pleasure (c) ;

To dispose for payment of debts, &c. (d) ;
viz. gift of all my estate, real and personal, to dispose of for the payment of all my just debts, and for the performance of all such legacies as I have herein, or by the codicil annexed, bequeathed to my executor above-named ;

To a person " on the same conditions," (being words of reference to conditions raising the implication of a fee) (e) ;

To be at his discretion (f) ;

To be at the discretion of a person, without any disposition to him by name, otherwise than to express that the lands are to be at his discretion, and though an express estate for life, not inconsistent (g), was previously given.

That a person (tenant in tail under another devise) shall have power to dispose thereof at his will and pleasure ;

That a person shall be his executor or trustee; and from the context of the will, it is clear, that he is to have the testator's fee-simple lands in that character (h) ;

(c) 6 Mod. 111 ; 8 Vin. Abr. 236.

(d) *North v. Crompton*, 1 Ch. Ca. 196.

(e) *Doe v. Cundall*, 9 East, 400.

(f) *Whiskon v. Cleyton*, 1 Leon. 156 ; 8 Vin. Abr. 235.

(g) *Goodtitle v. Otway*, 2 Wils. 6.

(h) *Infra* ; and see a case in King's Bench, Hil. T. 1820.

That the executor shall levy a fine of the testator's lands to a particular person (*i*);

That the executors shall *grant a rent in fee*, or make a *feoffment* (*k*);

1. That a person shall be *his heir*, or his sole heir and executor, "*ayere et yexecuturie*" (*l*); or,

2. *Heiress and executrix* of his lands, tenements, goods and chattels, the same to sell and dispose of, as she shall think proper, to pay his debts and legacies (*m*); or,

3. That one person shall *be heir to* another, to whom an estate for life is previously given by the same will (*n*);

4. That *A B, C D, and E F*, shall be trustees of inheritance for the execution hereof (*o*):

has, upon the principle of the first rule, been held to pass the fee.

In each of the instances offered in example of the application of the rule, there is some

(*i*) Latch. 138; 16 Hen. VI.

(*k*) Sir Henry Gifford's case, 4 Leon. 156; Cro. Eliz. 679.

(*l*) Marrett v. Sly, 2 Sid. 75; T. Jones, 25; Loveacres v. Blight, Cowp. 352; Spark v. Parnell, Hob. 75.

(*m*) Rogers v. Rogers, Cas. temp. Talb. 268; 8 Vin. Abr. 236.

(*n*) King and Rumball, 8 Vin. Abr. 205 a, pl. 2; Hob. 75, is contra.

(*o*) 2 Smith's Rep. 69, per three Judges against Lawrence; 1 Bos. & Pull. N. R. 116; 7 East, 97; affirmed in House of Lords; Dow's Rep.

particular expression which governed the decision (*p*).

The fee passes, in the first and second instances, by the word *for-ever*; in the third instance, by the words *in fee-simple*; in the fourth instance, by the word *heirs*, notwithstanding the addition of the words for their lives; for the word lives, in reference to the heirs, is not any restriction of the estate. The word lives, is equivalent to *for-ever*; for there cannot be a perpetual succession *by heirs*, for life estates. The intention, in this respect, is against the policy of law (*q*). The words, for their lives, are of the like effect as a gift to a corporation, for their lives; a perpetual estate.

In the fifth instance, the fee passes; by the words, *and his successors*; in the first case; by the words, *and his executors*, in the second case; by the words *and his blood*, in the third case; by the words, *and to his heir*, in the fourth case; by the words, *or his heirs*, in the fifth case; and in the sixth case, by the words, *and his*, more especially with the additional words of declaration, that the devisee *shall do what he will with these lands*: in the sixth instance, by the *general power of disposition*, or unlimited right of ex-

(*p*) Litt. § 586; Shep. Touch. 439, 440; 1 Inst. 9 b; Salk. 235; Cro. Car. 129; Moore, 852; Cro. Jac. 416; 1 Roll. Abr. 835; 1 Eq. Abr. 176; *Vere and Hill*, 3 Burr. 1881; *Downhall and Catesby*, 1 Inst. 9 b.

(*q*) 2 Abstr. 167, *et seq.*

exercising a *discretionary* power over the property (*r*); in the last instance, by appointing, that the devisee shall take as *heir*, or in that character; and, in the other instances, by the similar or corresponding expressions, or from the purpose to be performed. These cases of purposes to be performed might, with equal, and even greater propriety, have been transferred to the third class; and they may be considered, by the student, as belonging to that class.

The intention to be collected, in all these instances, from the words of devise, supplies the want of that legal precision which the law requires in deeds.

In the first and second instances, without the word *for-ever*, the fee would not have passed.

A devise to a man, or to a man and his assigns simply, without the addition of any words of perpetuity, or declaration of time, and without any other circumstance, to show an intention to pass the fee, gives an estate for life only (*s*). There is not any sense expressed by these words, from which an intention to pass the fee, can be collected. The word *for-ever*, is, therefore, the material and operative word, describing an interest to have continuance beyond the period of a life (*t*).

(*r*) 8 Vin. Abr. 235; 1 Eq. Abr. 176, (5).

(*s*) 1 Inst. 9 b; Latch. 42; 2 Bl. Com. 108.

(*t*) *Fisher v. Nicholls*, 3 Salk. 127.

As to the third instance, the words *in fee-simple*, mark most clearly the quantity of time intended to be devised, by expressing the manner, in point of estate, in which the devisee is to hold the land, or other subject of property devised to him. This phrase is taken in the generally-received acceptation, and gives effect to the intention which is expressed. Therefore the words *in fee-simple* are, in this instance, to be considered as conveying the fee.

As to the fifth instance, the words, and *to his successors*, in the first case; the words, and *to his executors*, in the second case; the words, and *to his blood*, his family, his house, in the third case; the words, *and to his heir*, in the fourth case; the words, *or to his heirs*, in the fifth case (*u*); and the words, *and his*, in the sixth case; are the words of limitation expressing the time for the continuance of the estate.

These words, in the several cases to which they apply, express an intention in the respective testators, that the interest they have given, should not determine with the life of the person to whom the property is devised, but extend to those persons who shall follow the devisees as their successors; and the law construes the words in the sense in which they are used; merely giving them effect, as applicable to the

(u) 2 Atk. 645.

heirs, as the only successors to estates in fee; in like manner as the law, even in deeds and wills, construes a gift to a man and his heirs, or heirs males of his body, of a term of years, to be a gift to him and his *executors* (*x*).

As to the cases in the sixth class of instances (*y*), the general power of disposition, without an express limitation of estate, is their distinguishing feature.

Express words would restrict or qualify the estate (*z*).

To give a power of disposition which is general, in point of estate, whether that power be general or particular in regard to the objects in whose favor it is to be exercised; or to give to another individual the discretion of naming the persons who are to enjoy the property, and not to limit any express estate, is virtually, to give an estate which would support the disposition to be made, or discretion to be exercised.

This estate must necessarily be a fee; for the words expressing the power, or the right to exercise a discretion, are considered as referrible to an ownership, in point of estate; not a mere authority or power, without any interest.

So the direction, that the executors should levy a fine, shows an intention, that they should have an estate in the land, to enable them to levy a fine with effect.

(*x*) Litt. § 740; Shep. Touch. 271. (*y*) 1 Inst. 9 b.

(*z*) *Burdett v. Wright*, 2 Barn. & Ald. 710.

The case by which the sixth instance is exemplified, has also another circumstance to aid the construction of a fee ; for, as the lands were given to the devisee *and his*, the devisee might have taken the fee under these terms singly and alone.

An example to this effect has been already introduced.

Between words expressing a power of disposition, which is general, in reference to the persons in whose favor it is to be exercised, and words expressing a power, which is particular in that respect, a difference is made.

As often as the words of the power are *general*, the estate will be simple and absolute.

But as often as the words of the power are *particular*, or special, the words expressing the intention of the testator, imply a condition, or trust, that the property which is devised should be held by the devisee, or given to the persons particularly named in the will, and to no other persons.

Thus, a man devised his lands to his wife, to dispose and employ them for herself and her children, at her own will and pleasure (*a*) ; and it was held by *Dyer*, *Weston*, and *Welshe*, that the wife had the fee ; the same as if the lands had been devised to her for ever. They observed, that the construction of law supplied the defect of words, according to the meaning

(*a*) *Moor*, 57; *Bendloe*, pl. 9; see also *Daniel v. Upley*, *Latch.* 9, 3, 89, 124; 1 *Jones*, 137; 4 *Leon.* 42.

of the testator. It was also held by *Dyer* and *Weston*, that the estate of the wife was conditional. They said, the words *ea intentione* make a condition in any devise, but not in a feoffment, gift, or grant, unless it be in the case of the King; and that in this case, the words amounted to so much, that she should not give the lands to a stranger, but hold them, or give them to her children.

At this day, a trust, rather than a condition, would be the effect of these words.

The power of disposition, it has been observed, must be without any limitation of estate to the person who is to exercise the power (*b*).

Grant that an *express estate* is limited, and a power of disposition, either generally or in favour of particular persons, is added, the person to whom the devise is made, will have *merely* the estate limited to him *by express words*; and the right, in point of power, and not of estate, of disposing of the remainder.

The general rule is, that when a will devises to a man with a power to give a fee, he is construed to have an estate in fee.

The rule, however, must be understood, with the qualification, that he has not an *express estate* divided from the power.

In *Tomlinson* and *Deighton* (*c*), a man devised lands to his wife *for her life*, and then

(*b*) 2 Tr. Eq. 54; 4 Leon. 41.

(*c*) Salk. 239; 3 Leon. 71, S. P.; 8 Vin. Abr. 206, pl. 7, 234; Lucas's Mod. Cas. 31; Owen, 32; *Liefe v. Sallington*, 1 Mod. 289; 2 Lev. 104; 4 Leon. 41.

to be at her disposal to any of her children who should be then living : and it was held, that the wife took an estate for life only ; and that the disposing power was a distinct gift.

The Court proceeded on the ground, that the estate given was express and certain, and the power, by way of addition ; and that it was different from the other cases, which were general and indefinite ; viz. a devise to *IS*, and that he shall sell ; or a devise to *IS*, to sell. In these cases, they said, because the party was empowered to convey a fee, he was construed to have one, if he has no express estate, distinct from the power ; but, in this case, they held, that the power was a separate gift, distinguished from the estate, and that the estate was given in certain and express terms.

It is probable, however, there may be a difference, when, between the clause in which an express estate is devised, and the clause which gives the power, there is inserted a devise to another person, and when no such intermediate devise occurs. In the latter case, the estate of the devisee will not be enlarged. This is evident from the case of *Tomlinson and Deighton*. In the first case, perhaps the last clause would give the estate to the person who is to exercise the power. The cases of *Goodtitle ex dem. Pearson v. Otway* (*d*), and *Jennor v. Hardies* (*e*), may be referred to, as warranting this distinction.

(*d*) 2 Wils. 6.

(*e*) 1 Leon. 283.

In *Goodtitle v. Otway*, the Court denied the case in 3 Leon. 71, to be law. That case was decided on the ground that there was merely a devise for life, with a superadded power, and no *mesne* estate.

Also, where a testator directs that a person shall be his heir, or have land as heir to another, the manner in which that person is to take, and the time during which his enjoyment is to continue, is described; for the devisee taking as heir, and under that appellation, must be understood as substituted in the place of the heir, and to have the same extent of interest, as if he had derived his estate by descent from another.

The term *heir*, supposes an *ancestor*, and consequently amounts to an adoption; substituting the devisee, as an *hæres factus*, in the place of the person, who is the *hæres natus*: for the words heir and ancestor are correlative expressions. Whether an estate in fee, or in tail, passes by a devise to a man and his posterity, is a point in doubt. In a case before the Court of Chancery (*f*), upon a devise in these terms, the Lord Keeper inclined to construe the word to create an estate-tail (*g*): the Master of the Rolls was of opinion, it would pass the fee: and it is clearly settled, as will afterwards be noticed, that a devise to a man and *his seed* creates an estate-tail.

With a view to all the cases which have

(*f*) *Attorney General v. Bamfield*, 2 Freem. Rep. 286.

(*g*) See also 1 H. Black. 461.

been considered, it must be understood, that no expression is to be found in the will, explanatory of the sense in which the particular words already noticed have been used, and qualifying their extent; for an express limitation of estate will control the implication of law.

Thus, a man (*h*) devised the *fee-simple and inheritance* of some land to another and his children, in these words: "I also give and bequeath to my son *William Stevens*, when he shall accomplish the full age of twenty-one years, the *fee-simple and inheritance* of *Lower Shelstone*, to him and his child or children for ever; and it was held, that an estate-tail only passed. *Sed quære* (*i*).

Again, a devise to a man for ever, *for his life*, confines the continuance of the estate to that period.

So a devise to one for life, to dispose at his will and pleasure (*j*), gives an estate for life only; for the words superadded to the limitation, merely express an intention to authorize a power of alienation during that period, for which an estate is devised in terms.

Also, in the cited case of the devise to a man and his *children*, the words descriptive of the fee-simple and inheritance were construed to apply to the subject matter of property; and the words *and his children*, were held to be

(*h*) *Davie v. Stevens*, Dougl. 321.

(*i*) See *Doe v. Burnesall*, 6 Term Rep. 30.

(*j*) 1 Inst. 9 b; 8 Vin. Abr. 206, pl. 7, 7; 15 H. VII. 12, cited 1 Leon. 183, per *Crew*, C. J. Latch. 43.

words of limitation; and these words, as will be observed in the next chapter, confine the limitation to the devisee, and the heirs of his body, and consequently do not convey a more ample estate than a fee-tail.

But in several cases introduced in a subsequent page, a devise of all the estate to one for life, and after her death to another, was held to give the fee to the remainder-man; so that the word estate was descriptive of the interest; and the words of express limitation, amounted only to an exception of a particular interest in favor of the first devisee.

And it may be advanced, as a general position, that any expression by which the import and constructive meaning of a word of supposed limitation, is qualified, restrained or explained, or its presumable tendency and application are negatived, the construction will be agreeable to the words of explanation (*k*).

A devise to *A* for ever, will substantively pass the fee; but if the land be devised after his death to his *heir male* of his body; and for default of such heir male, then over; the devise will pass an estate-tail, and not an estate in fee-simple.

Again (*l*), a testator devised in these words; I give the fee-simple of my bigger house to *A*, and after *A*'s decease to *D* (*A*'s son); and it was held, that *A* took an estate for life only; for it

(*k*) *Wilkins v Whiting*, 1 Bulstr. 219.

(*l*) *Dyer*, 357, pl. 44; *Chycke's Case*.

appeared from the limitation to the son, that the interest of the mother was to determine on her *death* : and these are some only of the many examples which occur on this point.

The cases of *devises* to the church, to the school, &c. already introduced (*m*), are apposite examples, in elucidation of that part of the proposition, in which it is stated, that the fee may pass, when the objects of the devise are named by a term which refers to them, in a particular character, as having perpetual continuance.

So are the devises which declare that a particular person shall be heir to the testator, or heir to another.

As to the cases falling under the second head, that the words in which the testator has expressed his will, do, in common acceptance, import a gift of all his interest in point of estate.

The cases of this description may be divided into two classes :

- 1st. Those cases in which the devise is by words, which express the quantity of the testator's interest, rather than describe his property ; or accomplish both objects at the same time.
- 2d. Those cases in which the testator, by an introductory clause to his will, expresses an intention to dispose of all his estate, or all his substance, or, in other words, the whole of his interest ; and the words of

(*m*) *Cheesman v. Partridge*, 1 Atk. 436 ; *supra*.

disposition in the clause of devise are connected, in terms and in sense, with the introductory clause; and in common acceptation, import more than a mere description of the property, or subject devised.

The word *estate*, used in reference to real property, and standing general and uncorrected, is of this description, and comes within the first head of division.

A series of decisions has established this point.

All the cases have been decided on the ground, that this word, when descriptive of the subject, and *unless manifestly used in a different sense*, extends to the time or the interest in the subject, as well as to the subject itself.

On wills, in these terms, two questions arise: first, whether the words are applicable to *real property*? and secondly, whether they are descriptive of the testator's interest, in that property? and unless both these questions can be answered in the affirmative, the terms of devise will not pass the fee of real property. Either they will not confer any right whatsoever to real property, or they will give a particular estate in that property. But it seems to be universally true, that when these terms are descriptive of any interest in real property, and are not confined to the mere description of the subject which is devised, they will pass the fee of that property, unless words of restraint be annexed to the devise.

In *Hyley and Hyley (m)*, the testator, after devising several parcels of land to different persons, to some in fee, to others for particular estates, with words of limitation, devised all the rest and remaining part of his *estate*, to his three grandsons, to be equally divided among them, (one tenement in certain excepted, which he had previously devised in tail;) and it was adjudged, that the exception in the will comprehended the reversion. It was also held, that this reversion did not pass; but it was agreed, that without the exception it would have passed.

This, in effect, is a determination that the word *estate* embraced the real property of the testator, and was of sufficient extent to pass the fee of that property.

In *Reeves and Winnington (n)*, the testator was seised of a messuage in fee, and possessed of a considerable personal estate. He made his will, in which there was this clause: "I hear that *John Reeves* is inquiring after my death; but I am resolved to give him nothing but what my father has given him by will; I give *all my estate* to my wife." The question for the decision of the Court was, whether the wife had an estate in fee, or for life, in the messuage? and it was held, that the words *all my estate* were sufficient to pass the fee.

In this case, some observations fell from the Bench, on the declaratory words in the

(m) 3 Mod. 228.

(n) Ibid. 45.

former part of the will, respecting *John Reeves*, who was the testator's heir at law.

From the declaration that he should have *nothing*, they inferred that the wife should have *all*. The Judges do not appear to have founded their determination wholly, if in any degree, on these words.

Without entering into a minute discussion of the principle or application of this case, more modern adjudications certainly go the whole length of deciding the point, and settling the law to be, that the words of the devise are of themselves sufficient to pass the fee.

In *Carter and Horner* (o), the testator, seised of copyhold and freehold lands, and having a wife and *four children*, devised all the rest of his estate, whether freehold or copyhold, to his *wife and children*, to be equally divided among them; and it was held, that the word *estate* must signify the *interest in the thing*, and so pass a fee. The question as to children and issue is, whether these terms are used to describe the immediate object of the devise, or to give an estate, by describing the succession? and the Courts will sometimes draw their conclusion, as in the instances to be exhibited in the chapter on Estates-Tail, to the intention, from the circumstance that there are or are not children at the time of the devise (p).

(o) 4 Mod. 89.

(p) *Wild's case*, 6 Rep. 17; *Hodges v. Middleton*, Dougl. 430;
2 Wils. 7.

In *Murray and Wise* (q), the testator bequeathed 50*l.* to be paid to his heirs in three months, and devised all the rest and residue of his *real and personal estate* whatsoever, to his dearly beloved wife, and made her sole executrix; and it was decreed, that the wife had the fee-simple in the lands.

In *Wealthy and Bosville* (r), the fee would have passed by the devise to his son T, of all his estate real and personal, if there had not been a context to qualify the interest of the son into an estate-tail.

In *Beachcroft v. Beachcroft* (s), *Nathaniel Beachcroft* devised in these words: "I do by this my will dispose of such worldly estate as it hath pleased God to bestow upon me: First, I will that all my debts be paid and discharged, and out of the remainder of my estate I give and bequeath unto my wife 300*l.* My will and mind is, that my wife have one moiety of *what is left* after my debts paid (t). Item, I give to my brother, Sir Roger *Beachcroft*, a close lying in the parish of *St. Peter*, in *Derby*; and for the *remaining part of my estate, as well real as personal*, I give and bequeath unto my brother *Joseph Beachcroft*, whom I make executor." The question was,

(q) 2 Vern. 564; Prec. in Chanc. 264; *Bailis v. Gale*, 2 Ves. 48.

(r) Rep. temp. Hard. 258; *infra*.

(s) 2 Vern. 690.

(t) See *Lydcott v. Willows*, 3 Mod. 229.

whether a moiety of the real estate, after debts paid, passed to the wife, or only half of the personal estate: and by the Lord Chancellor, all my worldly estate comprizes real as well as personal; *his* worldly estate comprizes all he had in the world. Without doubt, these words subjected his real estate to the payment of his debts, and consequently a devise of a moiety of *what is left*, after debts paid, must comprize all that was liable to the debts; and therefore he decreed a moiety of the surplus of the real and personal estate to the wife.

In *The Countess of Bridgwater v. Duke of Bolton* (u), on a special verdict, found on an issue directed by the Court of Chancery to try whether the late Duke of *Bolton* did, by his will, devise certain fee-farm rents to *John Earl of Bridgwater* in fee; the devise appeared to be to this effect: "I give certain lands, (naming them) to *A*; and I give to *John Earl of Bath*, my son-in-law, 5,000*l.* and all my mines; all which I give to my said son-in-law, his executors and assigns, with all my plate and jewels, and all other my estate real and personal, not otherwise disposed of by this my will, to be given by him to his children, as he shall think convenient; I solely trusting to his honour and discretion, that he will give them such provision as will be necessary." And another clause in his will was; "Whereas I have contracted

(u) 1 Salk. 236.

for the sale of my fee-farm rents, my will is, that if my debts shall not be satisfied out of my other estate, my executors, (whereof the Earl was one) shall or may sell some part or all of them for payment of them, *notwithstanding the rents are not devised** by this my last will."

And the question was, whether his fee-farm rents passed to the Earl of B, and for what estate? And by *Holt*, C. J. who delivered the resolution of the Court, the rents passed by these words, *and all my real and personal estate*; for the word estate is *genus generalissimum*, and includes all things real and personal; and the fee of the rent passes as the whole of the estate of the devisor, for *all his estate is a description of his fee*.

"In pleading a fee-simple, you say no more than *seisitus in dominico suo ut de feodo*, and in formedon or other action, if a fee-simple be alleged, you say, *cujus statum* the demandant has now. In a will, the testator is not tied up to form; it is enough that he expresses and signifies his meaning by any words. Before the statute of Hen. VIII. if one had devised his lands, by virtue of a custom, the common-law accepted his intent, without requiring particular words of limitation; as in cases of conveyances at common-law: and, as it was so in devises before the statute, there is the same reason why it should be so since the statute:" and he held, that devising all his estate, and *all his*

estate in such a house, was the same; and that all his estate in the thing passed in either case.

And in *Haldane and Urry v. Harvey* (x), *Robert Holmes* devised all the rest and residue of his *estate whatsoever and wheresoever*, to his dear and loving wife, *her heirs*, executors and administrators. The question was, whether the language of the will had any application to real property? It was objected, that the word *estate* did not necessarily mean real estate: but Lord *Mansfield*, with the concurrence of *Willes* and *Ashhurst*, Justices, decided, that the word "*estate, carried every thing, unless tied down by particular expressions.*"

And in *Bailis v. Gale* (y), the testator devised in these words: "*I give to my son Charles Gale all that estate I BOUGHT of Mead, after the death of my wife,*" to whom he had previously devised the lands, so long as she should live; describing the lands, as all that estate he bought of *Mead*. And Lord *Hardwicke* decreed in favor of the son, declaring he was of opinion, that both the thing itself, and the property and *interest* the testator had, passed by the devise; and that all the latter determinations had extended, and leaned as much as possible, to make words of this kind comprehend not only the thing given, but the estate and interest the testator had therein: that in the last cases, the Court had endeavoured

(x) 4 Burr. 2484; 5 Burr. 2638.

(y) 2 Ves. sen. 48.

to make "estate" *amount to a devise of the whole interest, unless* [there be] *some words restraining or limiting that general sense*; according to Lord *Holt*.

Estate is admitted to be sufficient to make a description, not only of the land, but of the interest in the land. But he took notice, it was objected that the pronoun *my* was not added, and he said there was no occasion for it. It was necessary he should use such words as pointed out the *whole* interest he had in the land; which, he continued to observe, was sufficiently done by the other words, for *he bought of Mead the land, and the fee-simple in the land*, which is agreeable to the construction of the word estate, being sufficient to describe the thing, and the interest therein, as it is in the case of all my estate. As to the objection from the devise to the wife, that the same description was used in a former devise of this very land, where the testator did not mean to pass the whole interest in it; Lord *Hardwicke* said, that was no argument; that the testator did not understand the word *estate* to comprize not only the thing, but the interest and property in the thing. Persons not knowing the law, know when to add a restriction to what they give. Therefore, his adding that to his wife's devise, showed that he was apprehensive this word estate would pass the whole otherwise, and rather confirmed and strengthened the subsequent clause.

In *Scott v. Alberry* (z), the testator, "as touching the worldly estate, it had pleased God to bestow upon him," devised in these words: "I give to my cousin *T S*, all that my parcel of land lying in *Waltham Abbey*:" (being the lands in question). "Item, I give to my said cousin *T S*, my wearing apparel, linen, books, with all *other my estate whatsoever and wheresoever* not hereinbefore given and bequeathed; and him the said *T S*, I make the sole executor of this my will for performing the same."

It was urged, that the testator gave only his apparel, linen, books, with his other estate, which must be construed with his other *estate of the same nature*, and not an estate of an higher nature; that the estate was copyhold, and passed by the surrender, not by the will; and when he surrenders, to such uses as should be declared and expressed by his will; and in the clause by which he devised the copyhold, he gave it to *T S* only, without saying any thing of his heirs; it would be a forced construction, that the words "with my other estate not before bequeathed," should enlarge the estate before expressly limited to *T S*; and after these words he added, him I make my executor for performing my will; which words imported that he intended nothing for him by this clause, except such estate as belonged to an executor.

(z) Com. Rep. 337; 8 Vin, 228; 3 Atk. 493.

But the Court held, that when he gave all *whatsoever*, that comprehended all that he had, real or personal estate; and when he had surrendered to the uses declared by his will, the will should have the same construction as if it had passed the land itself: and *Wilmot* observed, "*Whenever it appears that the intention is to devise a fee, it is immaterial what words are made use of.*"

This case also proves, that notwithstanding an express devise of the land, without any words of limitation, the fee of these lands may pass to the devisee thereof by a residuary clause under general words.

There is a case more strong than either of those already noticed (*a*).

A testatrix disposed of several parcels of land for different estates, by express and proper words of limitation; and with words of modification to express the quality of the tenancy, as in common, and gave several pecuniary and specific legacies, and then devised in the following words:

"All the rest and residue of *my estate*, of *what nature or kind soever*, I give, devise and bequeath unto my aunt, *Catherine Chapman*, for and during the term of her natural life; and after her decease, my mind and will is, and I do hereby direct, that *the same*, and every part thereof, be equally divided between my said

(*a*) See on demise of *Burkitt v. Chapman*, 1 H. Bl. 223.

cousins, *Catherine Burkitt, Anne Hodgson, Elizabeth Hodgson*, and *Rebecca Maynard*, and the child of my late cousin *Sarah Hodgson*, share and share alike; and in case either of them, my said cousins, shall happen to die before he she or they shall be entitled to have or receive his, her or their said share, the child or children of my said cousins so dying shall stand in the place of his her or their parent, and have such share as his her or their parent would have been entitled to: and I direct that the share which the child of my late cousin *Sarah Hodgson*, and also the share or shares of the children of either of them, my said cousins, so dying as aforesaid, *shall be paid* to the *guardian* of such child or children, and the *receipt* of such guardian shall be a sufficient discharge for the same."

The testator died seised of eight acres of freehold, and four acres of copyhold lands, and these were the lands in question, as not particularly devised by the will. She had duly surrendered the copyhold to the use of her will. In this will there was not any introductory clause, nor any expression from which an intention in the testatrix to dispose of all her property could be collected.

On behalf of the devisees, two questions were made: 1st, Whether it was not the intention of the testatrix to pass all her property? 2dly, Whether the lands, not specifically devised,

should not pass under the residuary clause? and it was contended, on the part of the heir at law, that the intention of the testatrix was to give her personal estate only to her cousins, by the residuary clause; that where words are used, which may be applied indifferently, either to real or personal property, they shall not be applied to real, to the disinherison of the heir (b); that the phrases in the prior clauses were peculiarly applicable to real property; that if the residuary clause had stopped at the word estate, &c. to C C, &c. it would certainly have been a devise of real property; but that it went on to direct, that the same should be equally divided between her cousins, and that the child or children of such as should happen to die, should stand in the place of his, her or their parent, and have the parent's share; that this could only respect personal property, since the children would inherit the parent's share of a real estate without any provision of this kind; that these shares were likewise to be paid to the guardians of such children, and the receipts of such guardians to be a discharge; that such payment and receipt were appropriated to personal estate; and that the words, of what kind soever, might well be satisfied, by being applied to personal property, which consists of various species (c).

(b) 13 Mod. 592; Leon. 130; 1 Eq. Abr. 212.

(c) *Quære*, If the rule, "*expressio eorum quæ tacita sunt nihil operatur*," did not apply in this instance?

The determination was in favour of the devisees.

Lord *Loughborough* said, "As the testatrix had two kinds of estates, namely, real and personal, to which the words, 'all the rest of my estate, of what *kind soever*,' might be applied, the Court could not restrain the meaning of them to personal property, and negative the operation of them to real estates, particularly as they were so general and comprehensive;" *Gould* and *Heath*, J. were of the same opinion; and *Wilson*, J. observed, it was plainly the intention of the testatrix not to die intestate as to any part of her property, since it appeared on the case, that she had surrendered her copyhold to the uses of her will.

In *Barry and Edgeworth (d)*, *Judith Only* devised all her *land and estate in Upper Catesby*, in *Northamptonshire*, with all their appurtenances, to *William Edgeworth*, Esq. (to whom she would have been married, in a short time, had she lived,) without limiting any estate. It was objected, that only an estate for life passed in these lands; for that where a man devised his land and estate *in such a place*, it described only the thing, and not the interest in it; and the words in *Upper Catesby*, did nothing but point out the locality of the thing; and that the lands and estate, in this case, were synonymous.

The Master of the Rolls held, that the case of *The Countess of Bridgwater* and *Duke of Bolton*, had settled the law on this point; it being a resolution given on great consideration, in which the Lord *Cowper*, when a counsel, discouraged a writ of error in Parliament; and the Lord Chief Justice *Holt*, who pronounced the judgment of the Court, laid it down as a rule, that a devise of one's real estate comprehended not only the thing, but also the interest in it; that the word estate naturally signified the interest rather than the subject. He said, its primary signification referred thereto; and the Master of the Rolls added, that though the devise was of all her land and estate in *Upper Catesby*, this was not restrictive, with respect to the estate intended to pass by the will, but only *as to the land*; as if the testatrix had land in another parish: suppose, for instance, in *Lower Catesby*, those lands could not have passed by the will; that, as the word estate had been agreed and settled to convey a fee in a will, it would be dangerous to refine upon it, for then none could give any opinion thereupon; and these words and the like were frequently made use of in wills: besides, if the word estate did not pass a fee, in the present case, it would be quite void, since the devise of the land did before of itself pass an estate for life (e).

And no word in a will shall be rejected

(e) Plow. 160

which can have any construction, as is proved by *Smith v. Coffin* (f), in which the words, the rest and residue of my goods, chattels, rights, credits, personal and testamentary estate, whatsoever and wheresoever, and in whose hands soever, were extended to real estate, that the word testamentary might have effect.

In *Tuffnell and Page* (g), the testatrix expressed her will in these terms: "My estate in *Kirby Hall* I give to A," but no words of limitation were added. Lord *Hardwicke* declared himself of opinion, the word estate was sufficient to pass not only the thing, but all the interest which the testatrix had in the same; and he remarked, that though there was a locality, or an expression describing the situation of the tenement, yet the testatrix meant her interest in it too; for, said he, suppose (and he added, he believed it had happened), that a man should give all his real estate *in England*, here is a locality, and yet no one will say the interest does not pass, as well as the estate.

So the fee passed (h) by a gift of *all other his estate, of whatever nature soever, to his wife, whom he made his executrix, to pay his debts and legacies therewith.*

The fee, however, might, from the purpose of the gift, have passed without the word estate.

(f) 1 H. Black. 444.

(g) 2 Tr. Atk. 37; Barnard, 9.

(h) *Lane v. Hamkins*, 2 Show. 388

In *Ridout v. Pain* (i), *Richard Pain* devised all the rest, residue, and remainder of his goods, chattels, and personal estate, *together with his real estate*, not thereinbefore devised, to *Elizabeth*, his wife, and appointed her sole executrix: and Lord *Hardwicke*, after reading the words of the residuary clause, observed, there can be no question, but the words *together with my real estate*, will carry the inheritance, notwithstanding they are accompanied with the other words, goods, chattels, &c. For though there are cases in which it has been doubted, whether the word estate, joined to goods, &c. will carry the real estate; yet, when a testator says, *together with my real estate*, it puts it out of all doubt.

It may be observed, that the break in the sentence showed, that the testator did not use the words real estate, in the same sense as the words in the clause, enumerating articles of personalty.

In *Ibbetson v. Beckwith* (k), Lord Chancellor *Talbot* said, the words *estate at* such a place, or *in* such a place, had been held to pass the fee; and he determined accordingly in that case. And on an objection of the tendency of the word *at*, to confine the word estate to a description of the subject, the Chancellor said, he did not think there was any difference between the words *in* and *at*; and added, that in his opinion, they meant the same thing.

(i) 3 Tr. Atk. 486.

(k) Cas. temp. Talb. 157.

And his Lordship laid down this broad rule of general construction; "*If the will be general, and taking the testator's words in one sense, will make the will to be a complete disposition of the whole; whereas the taking them in another, will create a chasm; they shall be taken in that sense which is most likely to be agreeable to his intention of disposing of his whole estate.*"

In *Wilson and Robinson* (1), the testator was seised in fee of a *tenant-right estate*, and devised to his cousin, *William Baldwinson*, *all his tenant-right estate at Brigisend in Underbarrow*; and in all that he and his father took of *Rowland Hubberty*, of his Majesty's lands, and all his land at *Beekside*.

On a special verdict, the question was, what estate passed by this devise?

It was objected, that by the words *tenant-right estate*, the quality, nature, and particular sort of land, as far as regarded the tenure, and not the tenant's interest, was in the testator's contemplation, and embraced by his intention.

But the Court held, that the fee of his *tenant-right estate* passed; and a distinction was taken between a devise by the words *tenant-right estate*, and *tenant-right land* (m); and it seems to have been agreed, that if the devise had been of *tenant-right lands*, the devisees would have had an estate for life *only*.

(1) 2 Lev. 91; 1 Mod. 109.

(m) 8 Vin. Abr. 208.

And in *Macaree v. Tall* (n), *John Tall* gave to his cousin, *John Macaree*, all his freehold, copyhold, and leasehold estates in the county of *Essex*; and having freehold and leasehold lands in *Middlesex*, gave and bequeathed all the rest and residue of his estate, both freehold and leasehold, to *Mary Tourne*.

And the Master of the Rolls decided, that the fee of the freehold lands in *Essex* passed to *John Macaree*.

After citing the cases of *The Countess of Bridgewater v. Duke of Bolton*, *Barry and Edgeworth*, *Ibbetson and Beckwith*, and *Tuffnell and Page*, he said, it was doubtful on the first clause, and he did not give his opinion on that solely, but on the whole case and circumstances; and he observed, that in the first clause, the testator gave such species of estates as he had in *Essex*; by the residuary clause, he described all he had out of *Essex*: upon that he declared that he founded himself; and he made this observation: "The quantity of the estate in *Middlesex* is not material; if there is any, it satisfies the will."

And in *Nelson and Corbet v. Delves and Corbet* (o), the testator devised his freehold estate; and it was held, that the devisee took the fee.

In *Cowper Marten* (p), *Thomas Spooner*,

(n) Ambl. 181.

(o) 5 Feb. and 16 June 1746, MS. Cases.

(p) 1 Term Rep. 140.

seised in fee of the premises in question, devised the same in these words: "I give and bequeath to Mrs. *Marten*, daughter of my late uncle Doctor *Benjamin*, *my estate at Braywick, Berks.*

It was objected, that the fee did not pass, 1st, for want of the word *all* to describe the entire estate of the testator; 2dly, because there was not any introductory clause; and 3dly, on the ground, that the word *at* fixed the locality of the subject.

All these objections were overruled; and it was held, that the fee passed.

Buller, J. said, the word *estate* is the most general word which can be used; and so far from being necessary to add words of inheritance, in order to carry the fee, words of limitation must be added, if the devise is to pass a less estate.

He adverted to the case of *Bridgwater v. Bolton*, in which the like doctrine was laid down by Lord Ch. J. *Holt*; and he sanctioned the determination of that case, and the reasoning of Lord Ch. J. *Holt*, with his approbation.

In *Goodwin v. Goodwin* (*q*), the testator gave all his estates in *A*, in *Norfolk*, in the occupation of *B*, *C*, and *D*. It was insisted, that this passed the fee; but *Hardwicke*, Lord Chancellor, said, of that he very much doubted (*r*). There were several cases, he

(*q*) 1 Ves. sen. 228.

(*r*) See 7 East, 259.

observed, on this head, and the general rule is, that the word estate includes not only the lands or thing, which is the subject of the devise, but also the estate or interest therein; as in the case of *The Countess of Bridgewater v. Duke of Bolton*. But that case was where the word estate was used generally, (all my estate real and personal); here the word estate is limited, in point of place; and though later cases, as *Tuffnell v. Page*, and *Barry v. Edgeworth*, have gone farther than the Duke of Bolton's, and have held, that by the devise of all my estate *in* or *at* such a place (between which words, *in* or *at*, an idle distinction has been made), not only the lands themselves, but all the interest therein passes; and so in 2 Lev. 92, by all my *tenant-right estate*; yet there is no case where it has been so held, where there is a farther description, as here, *in the occupation of particular tenants*. The objection is, that this description confines it to the lands themselves; and certainly, *nothing was in the occupation of these tenants, but the lands themselves, and nothing of the interest or fee which was in the testator*. Yet the answer given to this deserves consideration; that where the description has been by the locality, it has been held, both in law and equity, to comprize the interest; and there is no reason why the other words, *in the occupation, &c.* should restrain it more than the locality, which will not. But though the estate and interest in lands is not strictly local,

yet it is attendant on a thing which is local. But this is also *estates, in the plural number*, which, in common parlance, *means a description of the lands*. As this case, therefore, is particular and new, and none have gone so far, he concluded that he would give no opinion then.

In the cited case of *Bailis v. Gale (s)*, the testator devised *all that estate he bought of Mead*, after the death of his wife; and Lord *Hardwicke* was of opinion, and decreed, that both the thing itself, and the estate, property, and interest the testator had, passed by the devise; and he said, the latter determinations had extended, and leaned as much as possible, to make words of this kind comprehend not only the thing given, but the *estate and interest* the testator had therein. He observed, that the testator bought of *Mead* the land, *and the fee-simple in the land*; and this was agreeable to the construction of the word estate, being sufficient to describe the thing, and the interest therein, as it is in case of all my estate; and the cited cases of *Wilson* and *Robinson*, and *Macaree* and *Tull*, are authorities for the same point.

Also, when the clause (*t*), which has the word estate, is, in sense, distinct *from* and *independent of*, that branch of a sentence, which has the enumeration of articles of per-

(s) 2 Ves. sen. 48.

(t) But see 8 Vin. 293.

sonal property (*u*); or 2dly, when the word estate is at *the beginning* or *end* of a sentence (*x*); *and*, by reason of the *comprehensive* terms of the other part of the devise, *cannot be of any signification, unless it has application to real property*; or, 3dly, when the word *real*, or any other expression of that import, is conjoined to the word estate, the word estate may be taken, in its most extensive signification, and give a right to real property, and to all the interest therein, of which the testator could dispose.

Thus, a man bequeathed some legacies, and devised some lands (*y*), and then proceeded in these words, "all the rest and residue of my money, goods and chattels, *and other estate whatsoever*, I give to *I S*, whom I make my executor;" and it was decreed, that the fee of the lands not previously devised should pass.

Again, in the cited case of *Ridout and Pain* (*z*), Lord *Hardwicke* said, there could be no doubt, but that the words, "*together with my real estate*," would carry the land and inheritance, notwithstanding they were accompanied with the other words, goods, chattels, &c.; for though there were cases in which it had been doubted, whether the word estate, joined to goods, would carry the real estate; yet, when

(*u*) *North v. Crompton*, 1 Ch. Cas. 196.

(*x*) *Lumley v. May*, Prec. Ch. 37.

(*y*) *Terrell v. Page*, 1 Ch. Cas. 262.

(*z*) 3 Tr. Atk. 486; 1 Ves. sen. 10.

the testator says, *together with my real estate*, it puts it out of all doubt."

And in *The Countess of Bridgewater v. The Duke of Bolton* (a), the words, "and all other my real and personal estate," &c. &c. were held, on account of the adjunct *real*, to pass the fee-farm rents, which were the subject of litigation.

And in *Audrey and Middleton* (b), the words of devise, after a bequest of several legacies, were, "and all the rest of my goods *and* chattels, *and* estate, I give to Middleton; and it was held by Cowper, Lord Chancellor, that, from the frame of the whole will, the testator intended that his real estate should pass; but in this case, there was an introductory clause to the will; and by that clause, the testator intimated an intention of disposing of all *his worldly estate*; and this clause might aid the construction.

The like observation is applicable to *Tanner v. Morse*, and *Tilley v. Simpson*.

In *Tanner and Morse* (c), the words in the introductory clause were, *as to all my temporal estate*; and the words of devise, after a bequest of several legacies, were, "and all the rest and residue of my *estate*, goods and chattels whatsoever, I give and bequeath unto my beloved wife, *Mary Carter*, whom I make my full and whole executrix (d).

(a) Salk. 296.

(b) Cited Cas. temp. Talb. 286.

(c) Cas. temp. Talb. 284.

(d) Eq. Abr.

And it was held by Lord Chancellor King, that the word estate, as connected with the introductory clause, extended to the real property of the testator ; and on a rehearing, Lord Chancellor Talbot decreed, that an estate in fee-simple passed by the words of the will.

And in *Tilley v. Simpson (c)*, there was an introductory clause in the will, intimating an intention, on the part of the testator, to dispose of *all his worldly estate* ; and the words of the devise were, “ and all the rest and residue of my money, goods *and* chattels, *and* estate *whatsoever* ;” and *Hardwicke*, Lord Chancellor, declared himself of opinion, that the fee passed. He said, where the Court had restrained the word estate to a personal estate only, it had been when the intention of the testator, that it should be so used, had appeared ; or when it had stood coupled with a particular description of part of the personal estate, as a bequest of all mortgages, household goods, and estate, in which *the preceding words were not a full description of the personal estate* : that if the testator had said, all the rest and residue of my personal estate *and estates whatsoever*, a real estate would have passed : that this bequest amounted to the same ; for the word chattels is as full a description of the personal estate as the word personal : that therefore, when he had used words, compre-

(c) 2 Term Rep. K. B. 659, in a note.

hending all his personal estate, and then made use of the word estate, that word would carry a real estate: that the word whatsoever was used here, which was the same as if he had said, of *whatever kind it be*; and if that had been the case, it would most certainly have carried the real estate: that the cited case of *Terrell and Page* was very material in this case; and that he thought the cases could not be distinguished from each other: in that case, the words of devise were, "all the rest and residue of my money, goods and chattels, *and other estate whatsoever, to I S*;" the only difference was, in that case, there was the word *other*, which he did not think could distinguish it: if the devise had been, and all the rest and residue of my household goods, *mortgages, and all other estate*, he did not think the words would have extended to the testator's real estate.

The motive and ground of *this last observation* were evidently, that the preceding words were not a full description of all the testator's personal estate.

Again, in the case (*f*) to which *Tilley and Simpson* is subjoined, a testator, after bequests of several legacies, and a devise of shares in the corn-market, to a nephew for his life; and of other estates, by that term, explained by particular descriptions of the lands by their local situation, to his wife for life, devised all his

(*f*) *Fletcher v. Simpson*, 2 Term Rep. 656.

estates, WITH ALL monies in stocks and *William Morley's* hands, to four persons, share and share alike; and it was held, that the fee passed.

In observing on *Bailis* and *Gale*, already cited, (the case of a devise of all the testator's estate, both real and personal, by a residuary clause,) Lord *Hardwicke* said, as to the residuary clause, it has been held, that where estate is mentioned generally, accompanied with personal things, it should be restrained to personal; but never where real estate is mentioned; for then [*viz.* in the first case] the personal things shall be considered only as an enumeration.

The fee also passed by the gift of all my real and personal estate (*g*):

And by the words, "all the rest and residue of my estate whatsoever and wheresoever (*h*):"

And by the words, "all other my estate, of what nature soever," followed by the words, "I give to my wife *Joan*, whom I make my executrix, to pay debts and legacies therewith (*i*):"

And by the words, "my whole estate to my wife, paying debts and legacies (*k*):"

Also by the words, "all my freehold and leasehold estates (*l*):"

(*g*) *Barnes v. Patch*, 8 Ves. 604, by Lord *Eldon*.

(*h*) *Doe v. Chapman*, 1 H. Black. 223.

(*i*) *Lane v. Hawkins*, 2 Show. 388.

(*k*) *Johnson v. Kirman*, 1 Roll. Abr. 834.

(*l*) Per Lord *Kenyon*, in *Doe ex dem. Davy v. Burnsell*, 6 Term Rep. 34.

Also the equitable fee, subject to the legal estate in trustees for the payment of debts, has passed by force of the words, "all the rest, residue, and remainder of my real and personal estates whatsoever and wheresoever, I give to my wife, her heirs, executors, and administrators; and I constitute her my sole executrix (m)."

In that case, the devise was to trustees to sell and to pay. The surplus produce was not given. The residuary clause passed this residue and the right to the equitable estate in the lands till sold.

The like point was decided in *Cliffe v. Gibbons* (n), in which the testator directed, that all his debts should be paid as soon as conveniently could be after his decease, together with his funeral and other charges; and thereby gave power to *Elizabeth Waterhouse*, his wife, if need should be, to sell his lands, tenements, servants, goods, and chattels in *Jamaica*, and his leases, shipping, and goods in *England*, to raise money to pay the same, and then to pay such legacies as are given by his will; among which, he gave his said wife 1,000*l.* to be by her detained out of the first money that could be raised by the profits or sale of his estate, after payment of his debts; and the residue of his estate, after debts and

(m) *Goodtitle d. Hart v. Knot*, Cowp. 43; also 3 Ves. and Bea. 160.

(n) 2 Lord Raym. 1324.

legacies paid, he gave to his said wife, whom he made sole executrix.

But in *Halliday v. Hudson* (o), though the executor took the real estate, and there was a gift to him of "all the testator's goods and chattels, stock in trade of every kind whatsoever; all money due to him at his death, and with every utensil belonging to the trade, in order to enable him to discharge all the testator's debts and legacies," with a subsequent clause, in these words, "the rest and residue I give to my executor before-named"; yet, on account of a recital, or, at least, partly on account of a recital, in these terms,^u my situation is such, that I am obligated to make a will; for, if I should do otherwise than well, my heir would come in for all my land, and my just debts would remain unpaid; as I owe," &c.; it was decided, that, in equity, the real estate belonged to the heir, subject to the payment of the debts.

And the fee passed by a gift of all the testator's estate and effects, real and personal, whatsoever and wheresoever, not before disposed of, after payment of debts, legacies, and funeral expenses (p).

Also, by the words personal estate, and estates whatsoever, the real estate and the fee thereof, would pass (q).

(o) 3 Ves. 210.

(p) *Infra*, word Effects.

(q) *Per* Lord Hardwicke and Lord Kenyon, 2 Term Rep. 660.

Also, by the word *estates*, standing singly and alone (*r*).

A repetition of the word estate, as in a gift, of all my estate and estates, may demonstrate an intention to pass real property, and all the estate therein (*s*).

And a general context from combined expressions, may produce an effect, which would not arise from any single expression. *Grayson v. Atkinson* (*t*), is an authority for this point.

And the fee has passed by the term estate, notwithstanding a limitation to *the executors*, and although there had been other gifts of other lands to the same devisee and her heirs (*u*).

And the fee may pass under a context, although the word "personal" be an adjunct to the word estate; as in a gift by these words (*v*), "I give unto my wife *Esther Tofield*, all my stock of cattle, corn, hays and grain, sheep, hogs and cattle of all kinds, household goods and furniture, ready money and securities of money, rights, credits, and *personal estates* whatsoever and wheresoever, subject, nevertheless, to the above legacies; to hold to the said *Esther Tofield*, for and during the term of her natural life, provided she keep single; but and if she marry, she shall receive no profits or benefits

(*r*) *Per Lord Kenyon*, 2 Term Rep. 660; but see *Lord Hardwicke's Opinion*, cited *ibid*.

(*s*) 2 Term Rep. 659.

(*t*) 1 Wils. 333; *infra*.

(*u*) *Williams ex dem. Hughes v. Thomas*, 12 East, 141.

(*v*) *Doe ex dem. Tofield*, 11 East, 246.

from my estates whatsoever; but at the time of her marriage shall resign up all my *personal* estates to the after-mentioned legatees, in manner following: first, I give and bequeath unto my brother, *John Tofield*, the house and premises wherein I now dwell, with the closes adjoining, and all the appurtenances thereunto belonging, with the tenements, to hold to him my said brother *John Tofield*, his heirs and assigns, for ever; and the remaining of my *personal* estates I give and bequeath to my brother *Joseph Tofield*, my sister *Elizabeth Ratlidge*, and my sister *Mary Capel*, share and share alike, to hold to them, their heirs and assigns, for ever; but and if the said *Esther Tofield* shall remain single or unmarried, I hereby declare that she shall possess *all my above-mentioned estates* for and during the term of her natural life, and at her decease I give, devise, and bequeath *my personal estates as above-mentioned*; that is, to *John Tofield*, my brother, the house and premises wherein I now dwell, with the appurtenances thereunto belonging, to hold to him, his heirs and assigns, for ever; and the remaining of my personal estates I give and bequeath to my brothers *Joseph* and *Benjamin*, and my sisters *Elizabeth* and *Mary* equally, share and share, to hold to them, their heirs and assigns, for ever: lastly, I do appoint my said wife sole executrix," &c.

And Lord *Ellenborough* observed, "as to the freehold lands, the Court has had no doubt;

the only question as to them was, whether they passed under the words 'all my personal estates;' and it being clear, beyond all possibility of doubt, upon the face of the will, that the testator meant by these words (not what is ordinarily understood by them, but) such real property over which he had an absolute personal power of disposition and control, we have no hesitation in saying, that the freehold passed by this description."

And under a gift of all the estate of the testator, an ulterior devisee may take *the fee*, although there be a prior gift for life or in tail to other persons; provided the word *estate* be used, and can be read as a gift of all the interest; and the several gifts are, in intention, dispositions to the several devisees of different *portions* of the fee-simple, in a distribution between them, of a particular estate, with remainders expectant on that estate (*x*).

Also, this term, or any corresponding term, (*y*), in a residuary clause, may carry the fee, notwithstanding the devisee has in the *same* property a particular estate by express limitation by a former gift (*z*); and even, although there be other property not previously devised,

(*x*) *Ibbetson v. Beckwith*, Cas. temp. Talb. 157; *Fletcher v. Smeton*, 2 Term Rep. 656; *Gretton v. Haward* and others, 6 Taunt. 94.

(*y*) *Hogan v. Jackson*, Cowp. 299.

(*z*) *Ibbetson v. Beckwith*, Cas. temp. Talb. 157; *Ridout v. Pain*, 1 Ves. sen. 10.

which might satisfy the language of the residuary clause (a).

Ibbetson v. Beckwith (b) affords the conclusion, that a devise of all the estate to one for life, and after his decease to another, will carry the fee to the remainder-man.

In that case, the devise was in these words : I give unto my loving mother *all my estate at Northwith Close, North Closes*, and my farm held at *Roomer*, with all my goods and chattels, as they now stand, *for her natural life*; and to my nephew *Thomas Dodson*, after her death : and Lord *Talbot*, after answering some objections to the efficacy of the word estate to pass the fee, continued to observe, that “ then it must return to the words all my estate to my mother *for her life*, and to my nephew *Thomas Dodson*, after her death ; and he added, now although the word estate may, in common speech, not mean an inheritance, yet it seems clear, he has meant it so here ; and then taking it in that proper legal sense, it will be a complete disposition of the whole ; whereas, taking it to carry but an estate for life, there will be a chasm, an incomplete disposition.” Afterwards, in the same case, and in answer to another head of objection, he added, “ Although he gave it particularly to his mother in the first place, yet the devise to his nephew is in general words ; and I cannot see that the

(a) *Ridout v. Pain*, 1 Ves. sen. 10.

(b) *Cas. temp. Talb.* 157.

limitation for life (*c*), in the first instance, where the second limitation is general, can make any difference.

That the fee may pass by the word estate, this word must stand general and unconnected : for,

1st, If a limitation be added to express *any particular time (d)* for the continuance of the interest ; or,

2dly, If the word be used as of the same signification with the word *tenement* or *farm (e)* ; and this is apparent from the context of the will ; or from any expression ; referring to situation, as, my estate *lying* in *S* ; or describing the land in the occupation of particular persons ; as, my estate in the occupation of *A* ;

it will be construed to be merely descriptive of the subject, and not to express the duration of interest or time of enjoyment.

That the general effect of the word estate, or any corresponding expression, may be restricted by express limitation of a particular estate, is proved by the case of *Sayer v. Masterman (f)*, (my several estates and farms, and all my other estate in the parish of *Croft*, to one for life, with limitations over) ; and by *Hodges v. Middleton (g)*, (my real estate in the parish

(*c*) See *Andrew v. Southouse*, 5 Term Rep. 293.

(*d*) *Infra*.

(*e*) 2 Term Rep. K. B. 659, per Lord *Kenyon*.

(*f*) Ambl. 344.

(*g*) Dougl. 431.

of *Barking*, with special limitations in strict settlement.)

A devise was of the *copyhold estate at Putney*, consisting of three tenements, and now under lease, without words of limitation, and only an estate for life passed (*h*).

And it has been held, that a gift in these terms, "I give my estate in the occupation of *A*, or lying in *B*; or I give my estates or farms, or estates and farms (*i*), will not pass the fee."

In ——— v. ———, Lord *Kenyon* observed, "I doubt, in this case (a case in which the devise was in these words)—[The reference to this case is mislaid; and, if found, will be supplied in the Appendix,] how the word *estates* could be construed to carry a fee, coupled as it is with words of *local* description, and followed by a devise of the *appurtenances* which necessarily would have been included, if he had meant to give a fee by the word estates (*k*)."

In *Fletcher and Smiton* (*l*), Lord *Kenyon* admitted, that the word estate might be so coupled with other words as to explain the general sense in which it would otherwise be taken, and to confine it to mean *farms* and tenements.

(*h*) *Petteward v. Prescott*, 7 Ves. 541. See 3 Ves. & Bea. 160. 6 Taunt. 317. 410.

(*i*) *Sayer v. Masterman*, Ambl. 344; *Frogmorton v. Wright*, 3 Wils. 418; *Hogan v. Jackson*, Cowp. 299; 2 Term Rep. 656.

(*k*) See *Doe v. Clayton*, 8 East, 141. S. P.

(*l*) 2 Term Rep. 659.

In *Doe v. Wright* (*m*), there were two devises, one to *I W*, of all his lands, freehold, copyhold, and leasehold, in *A*, the other to *I W*, of all his estate, freehold and copyhold, in *B*. *I W* took an estate for life only in the lands in *A*, although he took the fee in the lands in *B*.

But a devise of all my estate, real and personal, whatsoever; that is to say, my land, houses, and all other buildings, situate at *A*, on my estate, and likewise all my household furniture and stock in trade, carried a fee in the lands at *S* (*n*). *Gibbs*, Ch. J. in delivering the judgment, considered the rule of construction to be more extensive than in former times.

Formerly, it was doubted, whether the word *at*, connected with the word *estate*, and referring to the situation of the lands, would not confine the import of the word *estate* to a mere description of the property (*o*).

The determination of the case of *Cowper v. Martin* (*p*), already stated, and several of the other cited cases, exploded this notion.

In the last-mentioned case, it was held, that the word *at* would not of itself qualify or restrain the import of the word *estate*, or fix its meaning, so inseparably to the thing, that it might not be also applied to the interest;

(*m*) 8 Term Rep. 64; 1 New Rep. 335; *Mansfield* dissenting.

(*n*) *Denn ex dem. Richardson v. Hood* and others, 7 Taunt. 35.

(*o*) *Ibbetson v. Beckwith*, Cas. temp. Talb. 157.

(*p*) 1 Term. Rep. 411.

still, however, in drawing the conclusion, whether the word *estate* be or be not descriptive of a farm or other subject, there is more than ordinary difficulty.

Modern cases have relaxed the doctrine of the earlier decisions.

The progress already shown is, that the word *estate* may extend to the *interest*, notwithstanding the devise be of

My estate at *Braywick, Berks* ;
 All my estate in *England* ;
 All my estate bought of *Mead* ;
 All my tenant-right estate ;
 My freehold estate.

My estate freehold and copyhold in *B*.

And in *Roe v. Wright* (*q*), the Court of King's Bench decided, that a devise of all my estate [in] lands, &c. called and known by the name of the *Coal Yard*, in the parish of *St. Giles, London*, passed the fee ; but the Court supplied, in construction the word *in*, in that part of the gift in which this word is inserted in brackets.

Gibbs, Ch. J. in delivering his opinion in *Denn v. Hood*, did not advert to this circumstance (*r*).

In another case, *Mr. Poyntz* (*s*) devised by these expressions : " I leave to my dearly beloved and eldest daughter *Georgiana*, to herself, all my estate in the parish of *Bradfield*, with

(*q*) 7 East, 259.
 (*s*) MS. Cases.

(*r*) 7 Taunt. 35.

my farm called *Boots and Hazards*, to *Bella Townshend*, for herself." And 5th August 1811, the Master of the Rolls decreed, that all the estates in the parish of *Bradfield*, except the farm called *Boots and Hazards*, passed to the defendant *Lady Georgiana Anna Townshend*, in fee; and the farm called *Boots and Hazards*, passed to the defendant *Bella Townshend*, for life, with remainder to the said *Lady Georgiana Anna Townshend* in fee.

As to *Boots and Hazards*, the decision is very important, if it can be sustained.

And although in *Chichester v. Chichester (t)*, the devise was "of all my estate of *Ashton*," the terms were descriptive of the interest, and passed the fee, and were not restricted to a locality, so as to be confined to the lands.

In *Denn ex dem. Richardson v. Hood (u)*, the devise was, "of all my real and personal estate whatsoever; that is to say, my lands and houses, and all other buildings, *situate at S*, upon my estate, and likewise all my household furniture and stock in trade," and yet the fee passed.

In *Harding v. Gardner (x)*, the gift was in these terms; my freehold estate, consisting of thirty acres of land, more or less, with the dwelling-houses, &c. and yet it was decided that the fee passed.

(t) 4 Taunt. 176.

(u) 7 Taunt. 35; 2 Marshall, 359.

(x) 1 Taunt. & Broderip, 72.

While in *Pettiward v. Prescott* (y), the gift was of my copyhold estate at *P*, consisting of three tenements, and now under lease, &c.; and the Master of the Rolls decided, that for want of words of inheritance, the devisee took an estate for life only.

In *Randall v. Tuchin* (z), it was determined, that the word estates, used in the operative clause of a will, although referring to *locality*, would convey a fee-simple, unless there was in the will other matter to control that signification.

The devise, according to the marginal note of the report, was to *T C*, of various houses, described by situation, abuttals, dimensions, and occupiers, "all which estates, being copyhold of the manor of *K*, I devise to *T C* for life, and after his decease, to his son *M C*."

Devise to *M P*, of various other houses and premises similarly described, including the *White Bear* public-house, and abutting on the copyhold estate before given, "all which-said estates, being copyhold, of the manor of *K*, I devise to *M P* for life, and after her decease, to her son *M P*; and I order, that so long as *W P* shall choose to live in the public-house, and keep the same in good repair, he shall not be charged more than his present rent. And I devise to *M P*, the son, all my freehold estate, situate, &c. And I bequeath to *S G*, and *H*

(y) 7 Ves. 548; see also 2 Term Rep. 659; 1 Ves. sen. 228.

(z) 6 Taunt. 410.

his wife, and the survivor, the sum of five shillings per week out of the estates bequeathed to *M P* and *M P*. Held, that *M P*, the son, took an estate in fee in the copyhold.

Gibbs, Ch. J. among other observations, said, "Now the word estate is here used in the operative part of the devise, not introduced incidentally after the devising part is perfected, but introduced in the devise itself. It is admitted by the counsel for the plaintiff, that the word estate carries a fee, unless other parts of the will restrain its effect. Formerly, a narrower construction prevailed, and it was held, that if the former words described locality, the word estate was not descriptive of the quantity of interest, but designated local position; but it is now held, that though the word estate points at a certain house or parish where the estate is situate, yet it shall carry a fee, unless restrained by other parts of the will. It may be, that the signification of the word estate may be restrained, but it lies on the party, who seeks to narrow its construction, to show by what expressions in the will it is restrained. Here the counsel for the plaintiff urges, that the testator, after the words of local description, uses the word estate as meaning no more than what he had before described. The counsel for the defendant fairly answers this; he says, the reason why the testator has enumerated the different houses of his copyholds, is, because he meant to give some to one person, some to

another: the freehold estate he meant to give all to one, and therefore says, "I give to *Marinus Combes*, all my freehold estate;" but that he was obliged to describe the parts of his copyhold, in order to show what was to go to one, and what to another; but after having enumerated them, he deserts the local description, and takes up the word estate; and it appears to me, that this is a fair explication of the cause of his so enumerating them, and does not take from the legal effect of the word estate, nor give it a narrower construction than the law generally gives it. In the case of *Doe v. Clayton* (a), cited by the counsel for the plaintiff, it is observable, that the word estate is introduced, and when the testator uses it, it there refers to the estate he had before given, and then the fee-simple does not pass by the word estate. The counsel for the defendant has also referred us to *Uthwatt v. Bryant*, and it does appear to us, that the present bears a very near resemblance to the case cited. Here his Lordship stated the devise in that case (b). The question was, whether the daughters took an estate in fee or for life. It was contended there, that though the gift was conveyed to them by the word estate, other words qualified it, and gave it a narrower sense than naturally belonged to the word. What the testator gave was his said freehold estate; and as he had

(a) 8 East, 141.

(b) *Vide* 6 Taunt. 317.

given his freehold lands for life before, it was contended, that the word estate signified no more than his said freehold lands; but this Court held, that it meant a fee; in addition to this, other circumstances of the will do certainly furnish a strong reason for saying, that "estate," as used by the testator, meant that which the law construes it to mean, if not restrained by other words. He gives to *Mary Price* for life, remainder to *Marinus Price*; and his will is, that so long as *W. Points* lives in the public-house, and keeps it in repair, he shall not be charged more than fourteen pounds *per annum*. It seems as if the testator contemplated that the two *Prices* were the persons who would have the power of raising the rent which *Points* paid; and it therefore strongly looks as if he meant that their estate should last at least as long as *Points* had the option of continuing in the public-house. Here is, in addition to this, an annuity to *Samuel* and *Hannah Groves*, of five shillings a week; and it is clear, that the testator contemplated that it was to be paid out of that which he had before given to *Mary Price* and *Marinus Price*; and it therefore shows, that he meant a larger estate than for life should pass to them. It is admitted by those who contest it, that the word estate, not being qualified, does carry with it this meaning. We think, looking at the other words of this will, that so far from qualifying this construction, they rather confirm it. It

does seem, therefore, that the property given to *Mary Price* and *Marinus Price*, is given to the latter in fee.

Mr. Justice *Heath* added, " I am of the same opinion. The principle is, that where the word estates is an *operative word*, it passes a fee ; and to try whether it be operative or not, the test is, to strike it out of the will, which test being applied here, the devise becomes nonsense.

Uthwatt v. Bryant (c), is another strong case to show that the Courts are relaxing in respect of the effect of words of locality.

In that case, a testator devised " all his freehold lands, tenements, &c. in the parish of *B*, to trustees, for a term of one thousand years, in trust, to raise five hundred pounds by mortgage, for the payment of his debts, subject to which term, he devises his said freehold lands, tenements, &c. in the said parish, to his wife for life, remainder to his son *C* for life, remainder to trustees, to preserve contingent remainders ; remainder to *C*'s first and other sons, and their heirs male ; and in default of such issue, he devised his *said freehold estate in the said parish* to his daughters, as tenants *in common*. And yet the daughters were held to be tenants in common in fee under this residuary clause of devise.

In *Denn v. Hood (d)*, Ch. J. *Gibbs* distinctly adverts to this change in the disposition of the Courts. He observed, " It is true, that for-

(c) 6 Taunt. 317.

(d) 7 Taunt. 35.

merly, these words would have received a narrower construction than we at this day put on them. It is true, that formerly, if the word estate were accompanied by words which pointed at locality, it would not have been held to carry a fee; but later cases, decided on the apparent or very probable intent of the testator, have held, that the word estate would pass a fee, notwithstanding that there were words of locality joined with it. One of the first was that cited, of 'my estate at *Braywick*.' So that devise in *Doe* on demise of *Child v. Wright (e)*, 'all my estate, freehold and copyhold, lying and being in *Ellington* in *Huntingdonshire*.' No case could be stronger than that for the inference, that the testator was pointing out only the local situation; but the Court held, that he meant by 'estate,' the quantity of interest he meant to convey; and by the words at *Ellington*, the description which was to identify the lands." And he explained the grounds of the decision in favor of the fee, by a criticism on the case before the Court (*f*); adding, "So here, by 'all my estate,' the testator means, according to the doctrine of the late cases, to designate the quantum of interest; and lest the parties should not know where to find the property, he adds the local description: my land is at *Stamford Bridge*, in *Yorkshire*; my houses are on the land, and my furniture is in the houses. I think, therefore, there is

(e) 1 New Rep. 335; 8 Term Rep. 64. (f) *Denn v. Hood*.

no ground to hold that these words passed less than a fee."

The other three Judges concurred.

And although the word *estates* has been coupled with the word *said*, and it was open to be contended, that the words "*the said estates*," were a reference to freehold messuages, lands, and tenements, previously devised, as the subject unconnected with the interest, yet the word *estates* was applied to the interest or fee, as well as the subject.

In *Roe ex dem. Allport v. Bacon (g)*, the testator devised to his wife, "all and singular his freehold lands, messuages, and tenements at *Tutbury* and *Hanbury*, and elsewhere, with all his household goods, cattle, chattels, debts, and implements of husbandry, &c. for her natural life; and after her decease, then all the said estates, goods, &c. to be divided among his sons, share and share alike.

The ground of the decision was expressed by Lord *Ellenborough*, in these terms:—

"If we were called on to construe this will with the same critical precision that would be prescribed to a grammarian, I should be much inclined to adopt the arguments of the learned counsel, because 'the said estates' do seem, in strictness, to refer to the freehold lands, messuages, and tenements before devised, according to the rule, *verba relata inesse videntur*. But, in cases of this sort, unless the testator

(g) 4 Mau. & Sel. 366; also *Uthwatt v. Bryant*, 6 Taunt. 317; *Randall v. Jackson* and another, 6 Taunt. 410.

uses expressions of absolute restriction, it may in general be taken, that he intends to dispose of the whole interest; and in furtherance of this intention, Courts of Justice have laid hold of the word 'estate,' as passing a fee, wherever it is not so connected with mere local description, as to be cut down to a more restrained signification. Now, in this case, we find the word 'estates,' which, at this day, may be taken to be equivalent to 'estate,' for the purpose of passing the whole interest; and really an argument is afforded from the company in which this word is found, why it should so mean. For the testator devises 'all the said estates, goods, &c.' amongst his sons, which, without doubt, passed the entire property in the goods to them; wherefore, by the aid of collocation, the word estates may, I think, fairly be intended to comprehend the entire interest in the lands. And this falls within the principle of the decision in *Roe v. Wright* (*h*), which is not at all broken in upon by the former decision in *Doe v. Wright* (*i*), upon another clause of the same will, in which the word estate did not occur. Wherefore, it seems to me, that the devisees under this will took a fee after the death of the widow. Upon the other point, 'my proportionable share,' means all his interest."

And *Bailey, J.* observed, "It seems to me, that 'estates' might be meant as explanatory

(*h*) 7 East's Rep. 259.

(*i*) 8 Term Rep. 64; 1 New Rep. 335.

of what the testator intended by the words 'all my freehold lands, &c. ;' and although upon those words alone, we should not have been warranted in saying, that the whole interest passed, yet now, that he has used the word 'estates,' this may be interpreted to mean the quantum of interest as well as the land."

But it must be acknowledged, that it is difficult to make the word *estates*, in this will, bend to this construction.

This case seems to be founded on *noscitur a sociis*.

Also, that the word estate may pass the fee, or even embrace real property, it must be used clearly, with reference to land, or some other subject of real property, or be so general, that it may *uno flatu* extend to and have for its object, real and personal property. If the term estate be inserted generally and indiscriminately in a clause, which enumerates articles of personal property, and be in the *middle of* that sentence, it will not be construed to extend to real estate, *without the addition of some words of express reference to things which savour of the realty*. Being in the *middle of* a sentence, in which the testator is disposing of his personal property, it will be construed in the same sense, as relating to things of the same quality.

Thus, in *Wilkinson and Merryland (k)*, a man, seised of *Blackacre* in fee, by mortgage which was forfeited, and of *Whiteacre*, as his

(k) Cro. Car. 447; 1 Eq. Abr. 178, pl. 9.

own inheritance, devised *Whiteacre* to his brother, and then devised all the residue of his goods, leases, *mortgages*, *estates*, debts, ready money, and other goods, whereof he was possessed (after debts and legacies paid), to his wife, and made her executrix, and died; it was held, that this was not a devise in fee to the wife of the *mortgaged land*. The objection was, that the word *estate* was coupled with chattels, which showed that he meant only estates for years; and the rather, because the words, "whereof he *was possessed*," showed that he intended only to give her chattels and the mortgage-money, and not the inheritance of the land.

And in *Timewell v. Perkins* (1), the will of *John Hitchins*, as to the material clause of devise, was in these words: "Item, all those my freehold lands and hop-grounds, with the messuages or tenements, barns, &c. now in the tenure and occupation of the widow *Leach*, and all other the rest and residue and remainder of my *estate* (m), consisting in ready money, plate, jewels, leases, judgments, mortgages, &c. or in *any other thing* whatsoever or wheresoever, I give to my dearly beloved *Arabella Hitchins*, and her assigns, for ever." And by Mr. Justice *William Fortescue*, sitting at the Rolls, "The question is, whether the residue passed to

(1) 2 Atk. 102.

(m) In this case, the word *estate* must have been considered as explained by the subsequent words of qualification; the general words meaning things *ejusdem generis*.

Arabella or not? There is no doubt," he said, "but the words to *Arabella* and her assigns, for ever, will carry the fee to her, without the word heirs (*n*). He added, "It has been insisted for the plaintiff, that the words in the preamble of the will, 'as touching the temporal estate with which it hath pleased God to bless me, I give, bequeath, and dispose of as follows,' show plainly the testator's intention to dispose of his whole estate; and that the Court will never intend an intestacy of any part; and that the word estate, will include lands, as well as personal estate; and, though coupled with words applicable to personal, yet will pass freehold.

"Although it would have been stronger, if the word real had been added, yet, however, this will not do, unless there are some words that show an intention to pass the real estate, or the Court will intend an intestacy in favor of an heir at law. The word estate itself, indeed, may include as well real as personal; yet, when the testator has expressed himself by such words as are applicable to personal only, I cannot intend he meant the real estate: *whatsoever and wheresoever must be* confined to the things antecedent, and is restrained to the hop-grounds and leaseholds; for, if he intended to give his wife all his real estate, why did he mention only the *Essex* estate.

"Estate, where it is only coupled with things

(*n*) 1 Inst. 9 b; *Chamberlayne v. Turner*, Cro. Car. 129.

the general context, a construction may be drawn, which would deny to the word *estate* the effect of comprising real property, or the estate therein, is proved by several cases.

Thus, in *Roe v. Airs* (q), the testatrix, after several other devises, devised in these words: "All the rest, residue, and remainder of my *estate and effects*, I direct to be *sold and disposed of*, as soon as may be, after my decease, and *thereout the expenses of my funeral to be paid*; and if there shall remain any overplus, the same to be equally divided between my said two daughters." And by the Court, although the general words are sufficient to pass a fee, in order to answer the purposes of a will, yet, in this case, they said, it was manifest that this remainder was not in the contemplation of the testatrix when she made her will, it being only a reversion expectant on the determination of an estate-tail, which her aunts might have barred; and the testatrix having, by the former part of her will, disposed of all the freehold estate to which she supposed herself entitled. They observed, it was *clear, from the purpose to which a part of the produce of what she directed to be sold was to be applied*, namely, *the paying of her funeral expenses*, that she only meant to dispose of something which could be sold IMMEDIATELY; and that this reversion might never

(q) 4 Term Rep. 605; see also 1 Eq. Cas. Abr. 211; *Strong v. Teat*, 2 Burr. 912.

have descended to her heirs. This case, however, seems to have been decided on a great refinement.

In *Grayson v. Atkinson* (r), the residuary devise was in these words: "As to all the rest of my goods and chattels, real and personal, moveable and immoveable, as *houses*, gardens, tenements, my share in the Copperas Works, &c. I give to the said A." And these words, from their connection with words in an introductory clause to the will, were held sufficient to pass the fee.

But Lord Chancellor *Hardwicke* said, he did not think the words, goods and chattels, real and personal, moveable and immoveable, would have carried the lands by the law of England, though they might have done so by the civil law.

So in *Doe v. Buckner* (s), the words, "the rest, residue, and remainder of my estate and effects, of any and what nature or kind soever or wheresoever," preceded by an introductory clause in these terms, "as to my estate and effects, both real and personal," was, from the context, viz. a gift to trustees, their *executors* or *administrators*, and a trust, to add the interest to principal, confined to personalty.

In *Woollam v. Kenworthy* (t), the gift was, "As for and concerning the clear monies to

(r) 1 Wils. 333.

(s) 6 Term Rep. 610.

(t) 9 Ves. 127.

arise and be received from the sale and disposal of the said rent of ninety pounds therein-before devised; in trust, to be sold and disposed of on the death of his wife, as also the monies to arise from a sale of the remainder of his household goods and furniture, plate, linen, china, beds, and bedding, and from all other his estate and effects, of what nature or kind soever and wheresoever, that the same should, in the first place, be subject and liable to, and charged and chargeable with, the payment of the before-mentioned legacies; and the residue of such monies to arise as aforesaid, to be divided into thirteen equal shares.”—And Lord *Eldon* said, “ My present opinion is, that this estate does not pass by this will; the will must be construed upon the principle on which it has been argued; that generally, when there are no special circumstances, real estate will pass; and the question is, whether, upon the whole, it is not clear, the testator did not mean, that any thing of a real nature should pass under the word ‘ estate.’ For that purpose, every part of the will must be looked at; to determine whether that word in the context in which it occurs, and upon the general intention of the will, and all the phrases of it taken together, is to be understood *ejusdem generis* of the personal nature immediately before described, or to take in the real estate. This is a will, devising real estate to trustees, to be sold, directing the produce of that real estate to be

divided with the testator's personal fund, the trustees qualified by the will to give receipts in discharge of the money, and to retain out of the trust-estate the charges, &c. The question then is, whether, by the insertion of this word, where it occurs, the testator who had anxiously provided for the application of a real estate, expressly devised upon the trust, can be taken to mean, that this other real estate, of which he was so seised, shall, by the effect of the word 'estate' occurring in this context, be clothed in the hands of the heir, with a trust of the very same nature as the estate specifically devised to the trustees? That is not a probable intention upon the will, taken altogether. Upon the specialties occurring in the phraseology of this will, I conceive, that estate descended to the heir at law." Afterwards, on further argument, he said, "I continue of the opinion I expressed. The question, whether the words 'all my estate and effects,' will include a real estate or not, depends, first, upon the immediate context of the will; 2dly, upon the general form and scheme of the will, as demonstrating the intention. First, there is in this will a direction, that the testator's debts shall be paid out of his personal estate by his executors. He gives certain legacies; and I think the meaning is not much varied, whether the phrase is the before-mentioned legacies, or 'all my legacies.' Having a real estate, and a real estate in a rent-charge, he gives the latter to

his wife for life ; and after her death, he gives it to trustees upon trust to sell. Then, after some legacies, comes this sweeping, general clause ; disposing, first, of the produce of the rent-charge, then, of the money to arise from the sale of household goods, furniture, &c. and from all other his estate and effects, of what nature or kind soever and wheresoever ; and he gives this fund, so made up, including the money arising from the land, subject to and chargeable with the payment of his legacies. It is true, those words mean nothing as to the personal estate, which would by the law be chargeable with the legacies. But they are capable of being fairly enough interpreted with regard to the money arising from the sale of the real estate, especially in a will, in many parts of which minute and accurate directions are necessary to facilitate the sale of the rent-charge, and to convert more easily into money that part of his real estate that he has expressly directed to be converted ; and cases, though unlikely to happen, might be put, in which the money arising from the sale of the rent-charge would not have been subject to the legacies, if not by force of those words that have been referred to ; and if in any case those words would have operation, they have their full effect by giving them that effect. There is an express trust for the sale of the rent-charge : all these directions, that the receipt of the trustees shall be a discharge to the purchaser, for the indem-

nity of the trustees, and that they shall reimburse themselves their costs, &c. apply to this property only. By 'the trust-estate,' he means the trust property clothed with that express trust; and it is by no means probable, that a testator, who intended the other part of his real estate, should be clothed with the same trusts, and be applicable to the same purposes, should not have said one word to that effect, giving all these particular directions as to the other estate, taking it out of the heir; and yet not saying a word as to that part of the estate which, in his hands, is contended to be subject to the trust. As to the legacies being payable immediately, they will be paid, as far as the personal estate is sufficient to pay them, immediately. The question is upon the whole context of the will, (admitting that, in a variety of cases, the word estate, in the enumeration of personal estate, may, nevertheless, include the real estate,) whether that was the probable intention of the testator? and I think it was not in this instance (u)."

And from a context, on the mode of conversion, the words real estate may be confined to chattels real, or personalty; and their application to estates of inheritance, or of freehold, be excluded (x).

So in *Markham v. Fursden* and others (y),

(u) S. P. by *Mansfield*, Ch. J. *Roe v. Yeud*, 2 New Rep. 220.

(x) *Newland v. Majoribanks*, 5 Taunt. 276; *Doe v. Buckner*, p. 139.

(y) 7 February, 1712, MSS.

the testator had the reversion in fee after estates-tail, and devised to his wife all his *estate*, chattels, real and personal; and the Lord Keeper decreed, that the fee did not pass. In this instance, the word real was read as an adjunct to the word chattels.

In *Tilley v. Simpson* (z), Lord *Hardwicke*, though he held, that the words all the rest and residue of his money, goods, chattels, and estates whatsoever, passed the fee, he said, "if it had been all the rest and residue of his household goods and mortgages, and all other estate, I do not think that would have carried the real." [*Sed quære.*]

And in *Cliffe* and another v. *Gibbon* and others (a), Lord *Hardwicke* is reported to have said, "Where a man devises all his estate, goods and chattels, and no mention has been made before, in the will, of lands, of which the testator was seised in fee, a fee-simple will not pass; but where real estate is mentioned before, in the will, and then such words follow, a fee passes."

The soundness of this distinction is questionable.

As it is of the first consequence to titles depending on wills, to fix with accuracy the instances in which the word estate, and any other collective term, or general expression, shall have the effect of passing the fee, it was

(z) 2 Term Rep. 659, note.

(a) 2 Lord Raym. 1324.

deemed important to take this detailed view of the decided cases.

To render this subject more intelligible to the student, a general and more summary review will (unpleasant as repetition may be) be taken of the more prominent distinctions.

On all the cases in which the word *estate* has been the material term, it may be observed, that this word expresses, in some instances, the quantity of interest, or continuance of time, and also the subject in which that interest is to be taken.

In other instances, it may, as to one clause, express the subject, and in another clause, express the quantity or duration of interest to be taken under that devise.

In other instances, it merely expresses the quantity of interest; and the subject in which the interest or time is to be enjoyed, is described by words which, in sound, are local; as my estate at or in such a *tenement*, or in such a *place*.

Thus, though at one time it was the prevailing opinion, that the word *at*, with reference to a place, fixed the locality of the subject; and the word *estate*, as the relative, applied to the *tenement*, and not to the interest; this idea was long since exploded, in *Cowper v. Martin* (b). But even at this day, greatly as the rule respecting words of locality is

(b) 1 Term Rep. 411.

relaxed, if the word estate stand in a sentence descriptive of the thing which is given, and is used without any application to interest or continuance of time, it will not pass the inheritance, but be taken in that acceptation in which it is used.

In these cases, the word estate is of the same import with the word tenement or farm, and describes the property.

From all the cases, then, it may be concluded, that *the word estate, used in application to real property, will be construed to express the quantity of interest, or describe the subject of property, as, from the context of the will, it shall appear to be used in one or the other sense.*

When there are not any words which confine the sense to place, as marking a locality; nor any words of qualification, to express, in terms, the quantity of interest which is given, an estate in fee will pass; the word estate being *genus generalissimum*, and requiring rather, that its operation and extent should be restrained by words of express limitation, to mark a particular time for the continuance of the interest which is given, than that words of limitation should be added to give extent to the interest.

So when the word under consideration is inserted in that clause of a will which enumerates articles of personal property, without any reference to things which savour of the realty, and is part of that sentence, it shall be taken in

the same sense, or be confined to chattels real, as relating to things of the same sort (*c*). On the other hand, when there is any word of reference to *real property*, as distinguished from chattels real; or the word estate is contained in a clause, or branch of the sentence, being distinct from that part thereof which has the enumeration of articles of personalty; or is at the *beginning* or *end* of a sentence, and cannot have any effect by reason that the other words comprehend all sorts of personal property; and it may, consistently with the apparent intention of the testator, have this construction, it shall be taken in its most extensive signification, and pass an estate in fee.

In *Terrell v. Page*, and *Tilley v. Simpson*, the word chattels was not only a full description of every species of personal property (*d*); but this word was preceded by a conjunction, which seemed to make that part of the sentence complete, and keep it distinct from the other part in which the word estate was inserted. Allowing the construction to have been influenced by this mode of expression, it is obvious, that it is not yet decided what is the effect of a devise by a testator, of all his goods, chattels, and estate; and yet there are opinions against the application of these terms to pass a fee.

In *Smith v. Coffin* (*e*), the words of devise

(*c*) 9 Ves. jun. 137, for a qualification.

(*d*) *Per Buller*, 2 Term Rep. 660.

(*e*) 2 H. Black. 444.

were, all my goods, chattels, rights, credits, personal *and testamentary estate*. The case turned partly on the extent of the introductory clause, and the intimate connection between the words in that clause and the words in the clause of devise. The Court, however, and particularly Mr. Justice *Buller*, lay considerable stress on the rule, that sense is to be given to every word; and that, unless the word *testamentary* was applicable to real estate, no meaning could be ascribed to this phrase.

It is also to be added, that, notwithstanding the testator has, by different parts of his will, shown that he knew the sense and effect of words of proper limitation; as in *Ridout v. Pain* (*f*); and has limited other lands to the same devisee, with express words of limitation (*g*); and that, notwithstanding, he has by another clause given the identical lands to the same devisee for a *particular estate*, as in *Hogan v. Jackson* (*h*); neither of these circumstances will of itself be decisive against the construction which would entitle the devisee to the fee; or even influence the determination; unless the intention to use the word estate in a sense short of its most general import, shall appear (*i*).

But all the determined cases admit of the qualification, that there must not be any nega-

(*f*) 3 Atk. 486.

(*g*) *Smith v. Coffin*, 2 H. Black. 444.

(*h*) Cowp. 299, *infra*, 184.

(*i*) 6 Taunt. 410.

tive on the intent of passing a fee ; and therefore, if it appear by the context of the will, that lands of inheritance are not the subject of the devise, these lands, and consequently any estate therein, will not be comprised, although the testator applies to the subject of the devise in his will the terms real estate and effects. The case of *Doe d. Spearing v. Buckner* (*k*), affords an authority from which this principle may be extracted.

In that case, the devise was in these terms : “ All the rest, residue, and remainder of my *estate and effects, of any and what nature or kind soever*, or wheresoever, I give and bequeath the same unto *C. Buckner and J. Robinson*, their *executors or administrators*, in trust, that they shall, from time to time, add the *interest* thereof to the *principal*, so as to accumulate the same ; as it is my will, that the said residue shall not be paid or payable, but at the time, and in the manner, and to the several persons, as the said principal sum of 4,000*l.* is hereinbefore directed to be paid.”

And Lord *Kenyon* observed, “ It is our duty to give effect to the intention of the testator, if that can be discovered ; but if *we cannot find out that intent, the title of the heir at law must prevail* ; and it is on the latter ground, that my opinion proceeds in this case. I do not see any

(*k*) 6 Term Rep. 612, 1799 ; *Doe v. Chapman*, 1 H. Black. 223.

words in the will to disinherit the heir at law. One of the trustees takes a beneficial interest in a former part of the will; and there is nothing in the will from which it can be collected, that the testator meant to confer any other beneficial interest on either of them. The testator set out in the beginning of his will as if he had intended to dispose of all his property. But though those general words would have shown his intention, if there had been subsequent words in the will to carry that intent into execution, as was held by Lord *Talbot*, in *Ibbetson and Beckwith*, it has been held, in a variety of cases, that alone they are not sufficient to dispose of a fee; and by adverting to the residuary clause, there are no words to pass the estate in question. The testator only meant, that that should extend to his personal estate. It is given to trustees, *their executors and administrators*; technical terms applicable to personalty. But I rely on the following words of the clause: 'To add the *interest* to the *principal*, so as to accumulate the same (1).' The interest and principle were to make one consolidated sum of the same nature; but these are terms wholly inapplicable to a real estate. Seeing, therefore, that there is nothing in the residuary clause to pass this estate, and that there is nothing in the will to make it necessary for the trustees

(1) See 4 Term. Rep. 605; 1 H. Black. 223; *Barney v. Patch*, 8 Ves. 604.

to take it, to perform any trust in them, the heir at law stands entrenched in his right as heir, and cannot be removed from it.

“ The addition to the case, that the personal estate was sufficient to discharge the several trusts, is satisfactory to our minds, though it is not the ground of our decision.”

There are other expressions, which, with the like qualifications and exceptions as are applicable to the word estates, are allowed to have the same extensive operation as the word estates (*m*).

Thus, *J. S.* having a remainder in fee, devised all his remainder; and it was decided, that the fee passed (*n*).

But a gift of “ the rest and *residue*,” was confined to *personal* property, although there was, in a prior part of the will, a gift of some real property (*o*).

And in *Bailis v. Gale* (*p*), the testator, by one clause of his will, devised in these words: “ I give to my son, *Charles Gale*, the *reversion* of the tenement my sister now lives in, after her decease; and the reversion of these two tenements, now in the possession of *Josiah Cook*.” Lord *Hardwicke*, in delivering his opinion on this clause of the will, observed, “ the next question is, as to the reversion, whether that

(*m*) *Infra*.

(*n*) *Norton v. Ladd*, 1 Lut. 762.

(*o*) *Bebb v. Penoyre*, 11 East, 160.

(*p*) 2 Ves. sen. 48.

passes a fee? I am of opinion it does. He added :

“ The *interest* the testator had in it, was the *reversion in fee* he had in himself, expectant on those leases he had granted, whether for life or years;” and his Lordship defined *reversion* to be a right of having the estate back again, (which created an interest,) when the particular estate determined. He observed, that, “ according to *Lutwyche*, a *reversion* passed the fee : that,” he said, “ was a devise of the *whole remainder*. Reversion is descriptive of that right of reverter, by way of eminence, that was in himself, consequently there is no ground to split or divide it ; for giving the reversion, gives the whole reversion, unless words are added, limiting or restraining the intent.” To these observations he subjoined the remark, “ that here also occurs the other argument, from his making a division of his estate among his children, that it was extraordinary he should give his children a dry reversion, when the antecedent estate might continue longer than their lives, which strengthened the argument (*q*), that they should have as liberal a construction as the law would allow.”

And again, *J S*, seised of lands in fee, had two houses, and devised that *B*, who was his heir at law, should *renounce all his right in Blackacre* to *C* ; and because the words were, “ *all his right*,” it was held to be apparent that *J S* intended that *C* should have the fee.

(*q*) *Rawlinson v. Cole*, *infra*,

And it was accordingly held, that he had an estate of that quantity (*r*).

And in *Cole and Rawlinson* (*s*), the testatrix devised to her son, all her *right, title, and interest*, which she then had, (with interposed words, referrible to other property,) in the *Bell Tavern*, (for this was the legal application of the words, as far as related to these lands); and, in the Court of King's Bench, it was held, by three Judges against *Holt*, (who thought the words, all her right, &c. did not refer to this property,) that the devisee had the fee; and that determination was confirmed by the judgments of the Exchequer Chamber and House of Lords.

And in *Andrew v. Southouse* (*t*), a testator devised in these words: "I give all my messuages, lands, tenements, and hereditaments, at *Whitehill*, late the estate of *Christie*, and all other my part, share (*u*), and *interest* in the estates of the said *Christie*, to my sister, for her life; and, after her decease, I give the same to *E. Southouse*, chargeable with the payment of an annuity of 20 *l.* to *James Tooth*, for his life, to commence immediately after my decease."

Lord *Mansfield* observed, "Where there are no words of inheritance, only an estate for

(*r*) *Hodgkinson v. Star*, cited 1 *Ld. Raym.* 187.

(*s*) *Ld. Raym.* 831; 1 *Salk.* 234; *Holt's Rep.* 744; 1 *Bro. P. Ca.* 109.

(*t*) 5 *Term. Rep.* 293.

(*u*) See *infra*.

life will pass ; unless there be something in the will to show, that the devisor intended to give a greater estate. In the will in question, the testator gave all her messuages, lands, tenements, and hereditaments at *Whitehill*, late the estate of *Christie*, and all other her part, share, and interest in the estates of the said *Christie*, to her sister for her life. Now I do not think that it is forcing the expression, *interest*, too much, to apply it to *Whitehill*, as well as to the other estates ; and *there is no doubt that that word will pass a fee.*"

And Mr. Justice *Ashurst* observed, " In one part of the devise, the words, 'all other my interest in the estates of *Christie*,' are used; which are clearly sufficient to carry a fee ; and it would be extraordinary, that some part of the estates should be given in fee, and the rest for life, when all are charged with the same payment of the annuity."

And the other Judges concurred in opinion.

On *Cole v. Rawlinson* (v), it may be observed, that the fee passed in a sentence which might have admitted of a more restricted sense, or limited application : Although there was a gift of the *Bell Tavern*, the subject of the devise, by name, the word in, was probably supplied by construction, to make the interest in the *Bell Tavern* the subject of the gift (x).

(v) 1 Bro. Par. Cas. 7.

(x) 1 Salk. 234 ; *Supra*, 153.

So a man, after giving his wife an estate for life, in *W*, in express terms, devised to her in these words: "I give my wife *the inheritance of W*, if the law allow it;" and it was held that the fee passed (*y*).

Also, a man devised in this language: "I devise my messuage, wherein I dwell, to my cousin *H*, and her assigns, for eight years; and my cousin *H* shall have *all my inheritance*, if the law will." And it was held by the Court of Common Pleas, that an estate in fee passed to the devisee (*z*).

It is said, a devise by a man, of all his lands of inheritance, was held to pass the fee (*a*). *Sed quære*, and see 157.

Also, the fee passed in a will (*b*), in which the testator appointed three persons "as trustees of inheritance for the execution hereof."

And it is agreed, that a devise of the fee-simple of lands, will pass that estate in the lands; unless the testator afterwards disclose, as he may, an intention to give a particular interest (*c*).

Also, a devise of the *fee-simple* to one, and, after his decease, to another generally, passes the fee to the person who is to take in re-

(*y*) *Widlake v. Harding*, Hob. 2. M. 8 Jas.

(*z*) M. 11 Jas. *Whitlock v. Harding*. *Quære*, if not the same case as reported by Hob. ? see 2 Ld. Raym. 834.

(*a*) *Whitlock v. Harding*, Mo. 873. Supposed to be S. C. as reported by Hob. and to be misstated; see 2 Ld. Raym. 834.

(*b*) *Trent v. Trent*, Dow's Rep. 162.

(*c*) Doug. 320.

mainder, by reason of the intention of the testator appearing, in the former part of his will, to dispose of all his interest (*d*). For the devise to the person to whom the gift is for life, amounts to no more than an exception of a particular interest or estate, and a disposition of that interest.

In *Chycke's case* (*e*), according to *Dyer*, the son took an estate for life, and the next devisee had the fee-simple, subject to an estate for life, in herself, with a remainder to her son for life ; and, according to *Bridgman* (*f*), in which this case is cited, the first devisee for life had the fee-simple, subject to an intermediate estate for life, in the son. But, notwithstanding the report of *Dyer*, and the manner in which this case is cited in *Bridgman* and *Latch* (*g*), it seems the son, the second devisee, and not the mother, the first devisee, took the fee-simple ; and when we consider that the question arose on the right of the husband of the first devisee, the widow, to be tenant by the curtesy, after the death of the second devisee, who seems to have died in the life-time of his mother, and that it was held that the husband should not have his curtesy, it will evidently appear that the mother did not take the inheritance.

Again (as has been already noticed), a tes-

(*d*) 1 And. 51 ; Bendl. 300 ; see also *Ibbetson* and *Beckwith* ; the like construction made on the word estates.

(*e*) *Dyer*, 357.

(*f*) P. 86.

(*g*) *Latch*, 44.

tator devised all his *tenant-right estate*, and it was held, that the devisee took the fee (*h*). A difference was taken between *tenant-right estate*, and *tenant-right land*.

But notwithstanding a gift of the *fee-simple* or *inheritance*, by these or any other equivalent terms, the gift may, by subsequent words, (as in the instances of a devise to testator's son, *William Stephens*, when he should accomplish the full age of twenty-one years, of the *fee-simple* and *inheritance* of *Lower Shelton*, to him and his child or children, for ever (*i*); and of a devise to her daughter *Anne*, of her *estate* and *effects*, *real and personal*, who should hold the same, as a place of inheritance, to her and her children, or her issue, for ever;) (*k*) be explained and qualified to pass an estate for life, or in *tail*.

And in *Davie v. Stephens*, Lord *Mansfield* observed: "If the testator had used the words, all his estate, inheritance, or for ever, and had stopped there, the fee-simple would have passed; but the words child or children were to the full as restrictive as if he had said, and if my son die without heirs of his body." (For qualifications, see Ch. on Estates-Tail).

Of the word hereditament, and the construction which that term has received, notice will be taken in a subsequent page.

(*h*) 2 Ld. Raym. 831.

(*i*) *Davie v. Stephens*, Doug. 321.

(*k*) *Wood v. Baron*, 1 East, 259.

To the word property, the like construction may be affixed as to the word estate, when this term is used, either alone, or in conjunction with other expressions, in the large and comprehensive sense of the word estate.

On the other hand, this term will be confined to personal estate, when the intention requires that restriction (*l*).

Indeed, the primary signification of the word property, like the word estate, is to carry real property, and the fee of that property.

In *Doe lessee of Wall v. Langlands* (*m*), the devise was in these terms: "To *Rosey Doran* and *Edward Wall*, I give and bequeath all and every the residue of my property, goods, and chattels; to be divided equally between them, share and share alike, after all my debts are paid." So that the word, property, was at the beginning of the sentence. And Lord *Ellenborough* observed, "That *property* is a term sufficient to pass real estate, when used in a last will, is not disputed; and the question is, whether the generality of its signification be restrained by any other words in the same instrument; or whether, from the whole texture of the will, or from any particular clauses in it, an intention of the testator to use it in a more confined sense, can be made appear." He added, "Surely all and every

(*l*) *Doe ex dem. Helling v. Yeud*, 2 New Rep. 214.

(*m*) 14 East, 370.

my property,' or 'the residue of my property,' is as comprehensive as 'all I am worth.'

"This brings it to the question, which is the material one in the case, whether the words immediately following the word property, are descriptive of the kind of property the testator intended to give; the same as if he had said, 'namely,' or 'viz. my goods and chattels;' which would have confined it to that species of property. But we do not feel ourselves warranted in so reading them. The more obvious and natural sense is, that they are to be taken cumulative; that is, as property and goods and chattels." And it was ruled that the fee passed.

In *Doe v. Lainchbury* (n), the testator introduced the gifts by these terms: "As to the little money and effects with which the Almighty has entrusted me;" [he then gave some real and some personal property;] "and as to all the rest, residue, and remainder, of my money, stock, *property*, and *effects*, of what nature or kind soever the same may be, at the time of my decease, I leave and bequeath the same, and every part thereof, unto my nephew *James*, and my niece *Sarah Lainchbury*, for to be equally divided between them, share and share alike;" and he appointed them executors and residuary legatees. And the will had the expressions and the context which Lord

(n) 11 East, 290.

Ellenborough noticed in delivering the judgment. It was decided that the fee passed.

And Lord *Ellenborough*, in delivering the judgment of the Court, observed, "It is a known maxim, that *an heir at law is not to be disinherited but by express words or necessary implication*. Here are no express words; but the question is, whether there be not a plain implication from the words used, that the testator meant to pass real, as well as personal, property and effects, by the words used in the residuary clause.

"The word effects, indeed, in its natural sense, more peculiarly imports moveable personal property; but that this testator did not mean to confine it to that sense, the first sentence of his will shows; for he begins, 'As to the little money and effects, &c. I dispose thereof as follows; that is to say.' And then he first orders his chambers in *Gray's Inn* to be sold: that was not moveable personal property; it was, at least, a chattel real; and, if no more, still it would show, that he meant to include chattels real. But he proceeds, next, to devise lands, &c. freehold and copyhold; and that clearly shows, that, in his understanding of the word effects, it was sufficiently large to carry his real estate. He afterwards directs money to be laid out in the purchase of land, to be added to his, 'other adjoining property.' That gives us a standard of his meaning of the word property; and shows, that he

of all the testator's interest, no well-founded reason could be opposed against its efficacy to carry the fee.

One of two tenants in common gave to the other tenant in common, by will, his half part.

It was doubted, whether the fee passed by this phrase (*a*).

In *Andrews v. Southouse*, the words of gift were, part, share, and interest; and the fee passed: but the word interest might have been the efficient word.

And, where a man devised *Blackacre* to his eldest son and his heirs, for his part or portion, and *Whiteacre* to his youngest son, for his part, omitting heirs, it was agreed, he shall have it in the same manner as the other hath *Blackacre* (*b*).

But, in a devise of a share (*c*), or by way of substitution, and not of similitude, of *totam illam partem* to the survivor, an estate for life only passed (*d*).

It is said, the word quit-rent may pass the fee, under a context (*e*).

In one case (*f*) it was decided, that the word *hereditaments* was a collective term, and would pass the fee in the property which was given by this term. But in *Denn ex dem. Moor v. Mellor* (*g*)

(*a*) *Bebb v. Penoyre*, 11 East, 160.

(*b*) 4 Bulstr. 127; 2 Ves. jun. 708.

(*c*) Sken. 339.

(*d*) *Pettywood v. Cook*, Cro. Eliz. 53; *Woodward v. Glassbrook*, 2 Vern. 388; Willes, 143, *dubit*.

(*e*) *Cuthbert v. Lempriere*, 3 M. & S. 158. *Sed quære*.

(*f*) *Doe ex dem. Palmer v. Richards*, 3 Term Rep. 356.

(*g*) 3 Anst. 781; 5 Term. Rep. 558.

it was decided by the House of Lords, that such a devise would not pass the *inheritance*.

Also, in *Doe ex dem. Snell v. Allen* (*g*), the word hereditaments was not descriptive of the interest, although it was preceded by introductory words (*h*), sufficiently ample to favor that construction, if the word would bear it.

It has sometimes been urged, that words which implied a freedom from restriction of estate, trusts, &c. would prove an intention to pass the fee.

In *Loveacres v. Blight* (*i*), the Court of King's Bench ascribed to the words, "freely to be possessed and enjoyed alike," the weight, that the free enjoyment must mean, free from all limitations; that is, the absolute property of the estate: but in *Goodright d. Drewry v. Barron* (*j*), the devise was to *A*, "whom I make my executrix of my lands, &c. by her freely to be possessed and enjoyed;" and the decision, notwithstanding an introductory clause, was against the right of the devisee to the fee, although the will extended to freehold lands.

But a devise of all to my mother, will not pass the fee (*k*).

Nor will a clause of "all the overplus of my estate to be at my wife's disposal, and I make her my executrix," extend beyond personalty, unless the intent be apparent (*l*).

(*g*) 8 Term. Rep. 497.

(*h*) *Infra*.

(*i*) Cowp. 352.

(*j*) 11 East, 220.

(*k*) *Bowman v. Milbank*, 1 Lev. 130; 12 Mod. 594.

(*l*) *Shaw v. Bull*, 12 Mod. 593.

Nor will a clause, by which the testator makes his wife executrix of his goods and lands (*m*).

So, under a gift in these terms: "I order the lease of my house, &c. to be sold, and all the rest and residue to be divided:" personal estate only, and not real estate, became subject to the dispositions of the will (*n*).

There are some cases connected with this subject, which should be noticed rather for illustration than as falling in strict propriety under this division. They are of the same class with *Wilkinson v. Merryland*, and *Timewell v. Perkins*. They prove that the word *lands*, in the middle or at the end of a sentence, enumerating personal property, will be confined to leasehold lands, or lands held for a *chattel interest*.

In *Piggot v. Penrice* (*o*), the words were, "goods, lands, and chattels."

In *Markant v. Twisden* (*p*), the words were, "all the rest and residue of my estate, chattels real and personal." And the Court must have read the word *estate*, as connected with chattels, in the sense of goods; and the words real and personal, as adjuncts to the word chattels, so as to import real and personal chattels, and thus exclude the word estate from the influence of the word real.

(*m*) Noy, 48.

(*n*) *Bebb v. Penoyre*, 11 East, 160.

(*o*) Prec. in Ch. 471; Gilb. Rep. 137.

(*p*) 1 Eq. Abr. 211.

In *Shaw v. Bull* (q), the words 'overplus of my estate,' were, from the context, confined to personalty.

In pursuing the second division of this class of cases, notice will be taken of other words, which, with the assistance of an introductory clause, or on the context of the will, have been held sufficient to pass the inheritance.

The cases of the second class are now to be stated: they are those with an introductory clause.

In *Beachcroft v. Beachcroft* (r), which is a case intimately connected with the authorities referrible to this class, *Nathaniel Beachcroft*, by his will, devised in these words: "I do, by this my will, dispose of such *worldly estate* as it hath pleased God to bestow upon me. First, I will, that all my *debts be paid* and discharged; and out of the remainder of my estate, I give and bequeath unto my wife, 300*l.* My will and mind is, that my wife have *one moiety of what is left after my debts paid.* Item, I give to my dear brother, Sir *Robert Beachcroft*, a close, lying in the parish of *Saint Peter*, in *Derby*; and for the remaining part of my estate, as well *real* as personal, I give and bequeath unto my brother *Joseph Beachcroft*, whom I make executor."

The question was, whether a moiety of the real estate, after debts paid, passed to the wife,

(q) 12 Mod. 597.

(r) 2 Vern. 690.

or only a moiety of the personal estate : and by the Lord Chancellor, “ My worldly estate comprizes as well real as personal. His worldly estate comprized all he had in the world. Without doubt, these words subjected his real estate to the payment of his debts, and consequently a devise of a MOIETY of what is left, after debts paid, must comprize all that was liable to the debts ;” and he decreed a moiety of the surplus of the real and personal estate to the wife.

And in *Grayson v. Atkinson (s)*, the testator introduced the devises in his will with these words : “ As to all my temporal estate wherewith it hath pleased God to bless me, I give and devise the same as follows :” And he devised in these words : “ As to all the rest of my goods and chattels, *real* and personal, moveable and immoveable, as houses, gardens, tenements, my share in the Copperas works, &c. I give to the said *A*.” And Lord *Hurdwicke* decreed, that by these words, *A* was entitled to the fee of the lands ; observing at the same time, with reference to the explanation from the *viz.* that if the testator had not so explained himself, he did not think that the words goods and chattels, *real* and personal, moveable and immoveable, would have carried the lands by the law of England, though they might have done so by the civil law.

(s) 1 Wils. 333 ; also *Beasley v. Woodhouse*, 4 Term Rep. 89.

In *Ibbetson v. Beckwith* (t), *Thomas Beckwith*, "as touching his worldly estate," devised his estate at *Helmhouse*, in *Hither Dale*, leasing at *Crew*, unto *Mary Beckwith*, his loving sister, without any words of limitation, and it was agreed, by Lord Chancellor *Talbot*, that the fee passed. In this case, indeed, the words in the clause of devise were of themselves sufficient in the opinion of the Chancellor to cover a title to the fee. This case is therefore introduced rather to show in what sense the introductory clause was understood, than to propose that this clause governed the decision. It was observed, in the argument of the counsel who debated the case, and argued against the extent of the will to pass the fee, that the words *worldly estate* were used by the testator only to show, that what he was doing was *animo testandi*; but not intended to reach the whole of his estate.

On this objection the Chancellor, in pronouncing his decree, observed, that he was of opinion, that these words proved the testator to have had his whole estate in view at that time.

In *Tanner v. Morse* (u), *Thomas Carter* devised in the following words, as far as they are material to the point under consideration: "As to all my temporal estate, I bequeath to my nephew *Tanner*," (who was his heir at law,) "the sum of 50*l.*; and all the rest and residue

(t) Cas. temp. Talb. 157.

(u) *Supra*.

of my *estate*, goods and chattels whatsoever, I give and bequeath to my beloved wife *Mary Carter*, whom I make my full and whole executrix." And it was decreed, that an estate in fee-simple passed by the words of this will. Indeed, the fee might have passed without the introductory clause.

But in *Markant v. Twisden (v)*, a man having previously settled all his estate of inheritance upon his wife, made his will, and thereby gave several pecuniary legacies to several persons, and then added, "all the rest and residue of my *estate*, chattels real and personal, I give and devise to my wife, whom I make sole executrix ;" and it was held, that the fee of the lands did not pass to the wife, because the precedent and subsequent words explained the intent to carry *only the personal estate*. This conclusion was formed from the circumstance, that legacies only were given by the first part of the will; and that the words rest and residue were *relative* to, and must be intended of, an estate of the same nature with that he had before devised, which was only personal; for having before given no real estate, there could be no *rest* or *residue* of that property of which he had not given any part. And the Lord Keeper added, "Then the words, chattels real and personal, explain the word *estate*, and show what sort of estate he meant, and made the devise as if he had said, 'all the rest of my estate, whether chattels real or personal,'

(v) 1 Eq. Cas. Abr. 211; Gilb. Eq. Cas. 30.

and so confined and restrained the sense of the word estate." This reasoning is questionable at this day.

Also, in the case of *Tuffnell and Page*, already cited, there was an introductory clause ; but it seems to have been clear, that the words of the devise, singly and apart from that clause, were understood to be sufficient to carry the fee.

In *Hogan v. Jackson (w)*, the Rev. *George Jackson* being seised of some towns and lands in *Coolishall* and *Glanbegg*, in fee, and of lands in *Ballyduffultra* and *Ballygally* for lives, renewable for ever, without impeachment of waste, and other lands under leases for three lives, with reversionary terms for twenty-one years from the death of the surviving life ; and being also possessed of personal assets to the amount of 1,300*l.* only, made a disposition, by will, of his effects, in these words : " And as to my *worldly substance*, I give and bequeath to my dearly beloved mother *Mary Jackson*, my house and lands of *Glanbegg*, and all their appurtenances, for and during the term of her natural life, clear and free of any deduction or charge whatsoever, and also the lands of *Ballygally*, subject to the rent only payable thereout, for the term of her natural life, with liberty of committing waste thereon." He then gave to *Ellen Cockeran*, the sum of 30*l.* to be paid her yearly during her life, for the support of herself and her son *George Jackson* ; to her

(w) *Cowp.* 306.

daughter *Ellen*, and her son *John Jackson*, respectively, the yearly sum of 20*l.* till the age of twenty-one; and then the sum of 400*l.*; all which bequests were to be raised and levied out of his lands of *Glanbegg* and *Coolishall*, *Ballygally* and *Ballyduffultra*. He also gave his cousin *Henry Wallis*, the sum of 1,000*l.* sterling, to be paid him as soon as conveniently might be after his decease; to his uncle, *Edward Jackson*, the yearly sum of 30*l.* during his life; he also gave unto his uncle *John Wallis*, 100*l.*; and unto *William Kena*, and *Jane* his wife, the sum of 200*l.* sterling; and then devised as follows: "I also give and bequeath unto my dearly beloved mother, *Mary Jackson*, all the remainder and residue of the *effects*, both *real* and *personal*, which I shall die possessed of;" and concluded with the appointment of executors.

This case came before the Court of King's Bench in *England*, on error, on a judgment on ejectment in the Court of King's Bench in *Ireland*; and, by Lord *Mansfield*, "There is but one point upon which the whole case turns, which is, to fix the meaning of the word *effects*, in the *English* language. It is nugatory to cite cases, unless you fix the meaning of the term to which these cases are to be applied. If the word *effects* is equivalent to the words *worldly substance*, used by the testator in the beginning of his will, or if it is synonymous to *property*, there is an end of the question; because all the

cases prove that the sweeping clause passes a fee ; on the contrary, if it can be shown that effects mean chattels, or personalty only, then the residuary clause can include them only. I take *effects* to be synonymous to worldly *substance*, which means whatever can be turned to value ; and therefore *real* and *personal* effects mean all a man's property."

His Lordship enumerated the different species of the testator's property ; and stated the different bequests of the testator's will, and he observed, they were material to be attended to in the construction of it : he stated the question to be, whether any real property at all passed to *Mary Jackson*, the mother of the testator ; and if any did, whether any thing passed, except the covenant for the term of twenty-one years, in the house called *Groghegans*, and burgage lands belonging thereto, being a title to a chattel real ; and if the rest of the real property of the testator, or a remainder therein passed, whether it could pass for a longer time than during the life of *Mrs. Jackson*, because there are no words of limitation : he observed, " the law of *England*, in the conveyance of real estates, requires words of limitation in the donation or grant to the creation of a fee ; and that without the word heirs, general or special, no man can create a fee at common law by conveyance ; that therefore, when wills were introduced, and devises of real property began to prevail, being considered as

a species of conveyance, they were to be governed by the same rule ; therefore, by analogy to that rule in the construction of devises, if there be no words of limitation added, nor words of perpetuity annexed, which have been held tantamount, so as to denote the intention of the testator to convey the inheritance to the devisee, he can only take an estate for life. For instance, if a testator, by his will, says, I give my lands, or such and such estates, to *A* ; if no words of limitation are added, *A* has only an estate for life. Generally speaking, no common person has the smallest idea of any difference between giving a person a horse and a quantity of land ; common sense alone would never teach a man the difference ; but the distinction which is now clearly established, is this ; if the words of the testator denote only a description of the specific estate or lands devised, in that case, if no words of limitation are added, *A* has only an estate for life ; and if the words denote the *quantum of interest* or property that the testator has in the lands devised, there the *whole* extent of such his interest passes by the *gift to the devisee*. The question is, therefore, always a question of construction upon the words and terms used by the testator. It is now clearly settled, that the words, "all his estate," will pass every thing a man has ; but if the word *all* is coupled with the word *personal*, or a *local description*, here the gift

will pass only personalty, or the specific estate particularly described.

All these principles being clearly settled, and certain, the question, in this case, must be a question of construction upon the will itself. Now, in this will, there are several things which it is material to observe; and first, the introduction is very material.

Introductory words cannot vary the construction of a devise, so as to enlarge the estate of a devisee, unless there are words in the devise itself, sufficient to carry the degree of interest contended for (x); but wherever they assist to show the intention of the testator, the Courts have laid hold of them, as they do of every other circumstance in a will, which may help to guide their judgment to the right and true construction of it. The introductory words used by the testator in the present case, are not strict legal terms, but they are the words of a plain man of sound learning. He says, "*As to all my worldly substance, I give, &c.*" What is substance? It is every property a man has. So in the statute 4th and 5th *Philip and Mary*, c. 8, for the punishment of such as shall take away maidens that be inheritors; the word substance is made use of, and means worldly worth. Thus the testator sets out; he then proceeds to dispose of his property, and in the course of his will provides for every body; for

(x) See also 6 T. Rep. 612; 5 T. Rep. 563.

his mother, his uncle, his mistress, his natural children, his cousins, and makes a particular provision for his heir at law, which provision is to continue during his life. To be sure, that circumstance alone would not exclude the heir from taking any thing not disposed of (*y*) ; but it furnishes an argument in favor of the construction contended for by the representatives of the mother, namely, that he intended the remainder of every thing to go to her by the subsequent residuary devise, and that he did not mean to die intestate as to any part of his property. He adds the sweeping clause after all the provisions before mentioned, at the same time not meaning to make his mother executrix. What purpose was it then to answer? I confess, then, I can see none, unless it was to dispose of all his worldly substance, agreeable to his declaration in the introductory part of his will. The words are, " I also give to my mother all the remainder and residue of all the *effects*, both *real* and *personal*, which I shall die possessed of. Now, is the true construction of these words to be confined to a gift of personalty only? Most clearly not; because the testator has expressly added the word *real* to the word *effects*. Do the words real effects, in law, mean real chattels only? No author has been produced to show they do; and in point of fact, there was but one lease belonging

[(*y*) *Hopkins v. Hopkins*, Cas. temp. Talb. 44.

to the testator in this case, which could come under this description; consequently, if the construction contended for by the defendant were the true one, only that lease would pass, which would be to narrow the construction of the word real very much indeed. The natural and true meaning of real effects, in common language and speech, is real property; and real and personal effects are synonymous to substance, which includes every thing that can be turned into money. In several clauses of the Bankrupt Laws, which make it felony in a bankrupt to conceal, remove, or embezzle any part of his goods, wares, merchandizes, monies, or effects, the word *effects* is made use of in this sense. If that be the true construction, there can be no doubt, but that the words remainder of real effects include the reversion of every thing not disposed of; in which case, no words of limitation are necessary. But an objection has been made, from the testator's giving his mother a specific estate for life; and making that estate not liable to be impeached for waste, which, it has been strongly contended, is totally repugnant, and inconsistent with an intention to give her the absolute property in the subsequent part of the same will; as to that, there might be reasons for his doing so, especially as he had, in respect of that specific estate, given her a preference to all his general creditors and legatees, by devising it free of all incumbrances. But I do not think the objection of

itself sufficiently strong to control the manifest operation of the subsequent words used by the testator in the introductory devise. It would be going a great way indeed to lay it down as a general rule, that where a particular estate is given to a person in one part of a will, and a testator afterwards devises to him, in more general words, that he shall not reap any benefit of such residuary devise. Indeed, as to this objection, the case of *Ridout v. Pain* (z), is exactly in point (a). There the testator, in the first instance gave his wife only an estate for life, in part of his real estate, and afterwards bequeathed her the residue, &c.

The objection of inconsistency, now so strongly relied on, was there made; but Lord *Hardwicke* overruled it, and held, that the residuary clause carried the inheritance notwithstanding. That case is also very near in point, as to the other objections made to-day; for the only difference between the sweeping clause, in that case and in this, is, that the word estate is used instead of effects. Here the words are all the remainder and residue of his effects, both real and personal, which includes all the testator's property. All the terms he makes use of, except the word effects, are technical terms; for *remainder* is applicable to real estate, and *residue* to personal estate. Therefore, the same rule of determination that

(z) 3 Atk. 486.

(a) See also Hob. 2.

was held in the case of *Ridout v. Pain*, ought to hold in this case. Upon the whole of the will, taken together, I am clearly of opinion, that the testator meant his mother should take the *whole* of his property, under the *residuary devise*, and that the words he has made use of are sufficient to effectuate that intention; consequently, that she took a fee in the fee-simple estates, and the whole of the testator's interest in the rest of his real property, subject to the charge thereon. And by *Aston, J.* the words real effects may relate to real estate, and there are many acts both in the *English* and *Irish* statutes, in which they can relate to nothing else: so the word substance is applicable to real estate, in the statute 4th & 5th *Philip* and *Mary*, c. 8. I think the intention of the testator, in this case, very clear.

And the case received a determination, first, in the Court of King's Bench, and afterwards in the *House of Lords*, according to the opinions of Lord *Mansfield* and Mr. Justice *Aston*.

From this case, and all the other authorities, it is to be concluded, that the *introductory clause alone will not pass the fee (b)*. It may explain the intention of the testator. In this view, it is a key to his meaning. Unless the words of the introductory clause are connected with the words of devise, or have some reference to them, they cannot have any effect; nor will

(b) *Frogmorton v. Holyday*, J. Black. Rep. 535; *Hogun v. Jackson*, Cowp. 306; *supra*, 150.

meant by it, real estate. Then follows, the residuary clause, by which he disposes of the rest of his 'money, stock, property, and effects, of what kind or nature soever,' &c. Then, having before shown his meaning of the word effects, and of the word property, as comprehending real estate, are we to look for a different use of the word, by other persons, on other occasions, when we have an index of his own mind to resort to, in the very instrument before us, where he has told us, that by those words, he meant real estate? *I know of no word, in general use, so inflexibly importing one meaning only, as to be incapable of bending to the manifest sense of the party using it differently.* In a late case (o) before us, we held, that the words, 'personal estate,' carried real estate; such being the clear meaning of the testator, as collected from the rest of the will. In *Hogan v. Jackson*, the word effects, joined with the other words importing the realty, would carry it; and in *Camfield v. Gilbert*, we restrained it to personalty, because it appeared, *by the context*, that personalty only was intended. But here it evidently was meant in the larger sense, and therefore we must give it that meaning, without doing any violence to any different construction put upon the same word in any other case."

In one case, *Nicholls v. Butcher* (p), the

(o) *Doe d. Tofield v. Tofield*, 11 East, 246.

(p) 18 Ves. 193.

words of gift were, simply, "I do give and bequeath all my *real* and personal property to my wife, *Molly Butcher*."

And Sir *W. Grant*, M. R., decided, that the *fee* of copyhold lands passed; observing, "I think the testator must be considered to have intended to pass his *whole interest*; as I do not see how a man can be said to give all his property, unless all his interest in it passes. It seems, in many of the cases, that the Judges have explained the meaning of the word estate, by saying, that it imports the absolute property."

So the devisee took the fee by force of the word property, in a case in which the gift was by the words, "After all my just debts and funeral expenses paid, I leave all the remainder in the above stocks, with my freehold property, to my sister *Margaret Stoker*; and all other monies due to me (*q*)". And it was decided, that the whole fee passed to the devisee.

In *Doe ex dem. Davie v. Roper* (*r*), the devise was by the testator to his wife, of all his property, both real and personal, for ever; and the devise carried the real estate, and the fee thereof.

And an intent to use these words in a more restricted sense was not inferred from a subse-

(*q*) *Doe dem. Shell v. Pattison*, 16 East, 221.

(*r*) 11 East, 518.

quent clause, by which he gave an additional annuity *after her decease*.

In *Roe ex dem. Helling v. Yeud* (s), the testator was seised in his demesne as of fee of and in certain estates in *Yorkshire*, mentioned in the declaration, and possessed of considerable personal property, consisting of goods, stock upon his farm, bills of exchange, bonds, book debts, and securities in the *Witham Drainage* in *Lincolnshire*, and funded property; and he willed, that all his debts and funeral charges should be paid by his executrixes and executor named in his will: he then gave several legacies and an annuity, and added, "Item, I give to the five grand-children of my late uncle, *Mark Fores*, four daughters and one son, namely, *Sarah Hale*, No. 1, *Paradise-place, Stockwell, Surry*; her sister, the wife of — *Yeud*, gentleman; their sister, the wife of *Mr. Swift*, of *Brunswick-street, Liverpool*; their other sister, *Catharine Helling*, spinster; and their brother, *Edward Helling*, of No. 11, *Featherstone-buildings, Holborn*; all five of whom I constitute and appoint my executrixes and executor, and to whom I give all the remainder of my property whatever and where-soever, to be divided equally amongst them, share and share alike, after their paying and discharging the before-mentioned annuities, legacies, debts, and demands, or any I may

(s) 2 New Rep. 214.

hereafter make, by codicil to this my will; all my goods, stock, bills, bonds, book debts, and securities in the *Witham Drainage* in *Lincolnshire*, and funded property."

And Sir *James Mansfield*, in delivering the judgment of the Court, observed, "In cases between the heir and devisee, the question is not, whether the heir can prove that the testator did not intend to pass real property? but, whether the devisee can prove that he did? The proof lies on the devisee. The common expression, that an heir shall never be disinherited, except by express words, or such as have a necessary implication, is incorrect, and is well expressed by Lord Chief Justice *Willes*, in the case of *Moon d. of Fag v. Heaseman (t)*, who, after showing that the rule is inconsistent with a variety of cases, says, 'but the rule is, that the intent of the testator ought to appear plainly in the will itself, otherwise that the heir shall not be disinherited.' And Lord *Hardwicke*, in *Timewell v. Perkins*, says, 'Supposing it would admit of a doubt, yet certainly the heir at law ought to be preferred, unless the intention of the testator to exclude him appears exceeding plain.' Where that intention does not clearly appear, the right of the heir must prevail, who is entitled by descent. The question here, therefore, is not, whether there be not words in the will sufficient to raise

(t) *Willes*, 141.

doubts? but, whether it appears with clearness and certainty that the testator intended to devise his lands to the five residuary devisees? There is no introductory clause in this will, indicating an intention of the testator to dispose of his whole property; nor is there one provision, throughout the will, which has the least relation to real estate. All the debts and legacies are to be paid by the executor and executrixes: there is no express charge of the debts on the real estate. Having made this incorrect residuary bequest, for what purpose did the testator make the enumeration at the end of his will, unless he intended to explain the meaning of the expression, ‘all the remainder of my property?’ Though I think that these general words would be sufficient to carry real estate, if not explained; yet, as the words stand, I think it doubtful whether the testator so intended or not; and as the intention is not clear, the claim of the devisees must fall to the ground, and the title of the heir at law prevail.”

And Mr. Justice *Rooke* added, “I agree, that the general words would be sufficient to carry a fee-simple in the lands, if they stood alone; but as the testator has, in no place, given property to any one, his heirs and assigns, nor in any way shown an intention to pass real estate, and the general words are followed by the restrictive enumeration with which the will

concludes, I think it at least doubtful whether the real estate was intended to pass."

In *Doe d. Bunny v. Rout* (u), the gift was by these expressions: "I desire my debts and funeral expenses to be paid; and, subject thereto, I give and bequeath unto my sister, *Ann Rout*, all my stock in trade, household goods, wearing apparel, ready money, securities for money, and every other thing, *my* property, of what nature or kind soever, to and for her own proper use and disposal; and I do hereby appoint her my whole and sole executrix of this my last will and testament." The will was executed so as to pass both real and personal estate; and *Ch. J. Gibbs* admitted "that both would pass by the language which was used, if the Court could collect a clear intent to convey both; but, if only doubts were raised, they would not disinherit the heir. *Mansfield*, *Ch. J.* in the case of *Roe dem. Helling v. Yeud* (x), lays down the law clearly on this subject. The question, therefore is, whether the Court can collect a clear design to pass real, as well as personal, estate? There is no case decided on similar words to guide us, therefore we must form our judgment of the meaning of the words." And after commenting on several cases, and particularly on *Roe v. Yeud*, *Gibbs*, *Ch. J.* continued to observe: "In that case, *Mansfield*, *Ch. J.* first states the

(u) 7 Taunt. 79.

(x) 2 New. Rep. 214.

principles on which the Court proceeds, and to which I alluded in my beginning, that there must be a clear intent to will away the property, otherwise the preferable title of the heir at law must prevail. It may be said, that the same force of reasoning which the late Chief Justice there uses, cannot be here applied. There the enumeration made by the testator, to explain what he meant by the remainder of his property, and which was restrictive of the meaning of the general expression, was made at the end of his will; whereas here, the words restricting the meaning do not follow, but precede the general expression; but many of his reasons apply forcibly. First, there is no introductory clause in either will, showing an intent to dispose of the testator's whole property. Secondly, there is no provision throughout the will, relating to real estate. Thirdly, in both wills, all the provisions for payment of debts and legacies, are for payment by the executor and executrixes: therefore, though the whole reasoning of that case does not apply here, a great part of it does; and, on the whole, we think, if the case were to be decided on the authorities now before us, they preponderate in favour of the defendant. On the words of the devise itself, seeing that, in all the introductory words used, the testatrix enumerates every particle of personal property which she can recollect, without saying any thing touching her land, and seems to add these words at last,

merely lest she should have omitted something, we cannot think but that if she had had it in her intention to dispose of her land, she would have used more particular expressions: at all events, we cannot collect from the will, a clear intent to dispose of her land: we therefore think, that the title of the heir at law must prevail."

The word *effects* does not, in its primary and genuine meaning, embrace real estate. It is applicable to personal rather than to real estate.

A context only, or an adjunct, can extend it to real estate (*y*).

Being a word of equivocal nature, it may be used to pass the real, or it may be confined to personal property (*z*). Therefore the word *effects*, with the adjunct *real*, or with a context which shows that this word is used in application to real estate held in fee, may pass the fee of real estate.

This word received this construction in *Hogan v. Jackson* (*a*), a case cited in reference to *introductory words*.

In *Hogan v. Jackson*, the fee passed, notwithstanding the devisee had an estate for life, by express gift, in a former clause.

In *Doe dem. Chillcott v. White* (*b*), the gift, after an introductory clause, and legacies and a devise of some property for life, was of all the rest and residue of the testator's goods, chattels,

(*y*) 2 Mau. & Sel. 455, 456.

(*z*) *Per Bayley, J.* 2 Mau. 457.

(*a*) 1 Cowp. 299.

(*b*) 1 East, 33.

rights, credits, personal and testamentary estate, and also his lands and tenements, to his wife, for her life, with power to give what she thought proper of her said *effects*; and the power extended to the fee.

In this case, *per* Lord *Ellenborough* (c), the words, said effects, by reference to the antecedent bequest, which comprehended both real and personal, were holden to include the real also; but that was so held by the Court, not upon the import of the word effects simply, but as it derived force from the reference that was given to it.

In *Doe v. Clarke* (d), the residuary clause was in these terms: "I appoint my beloved wife, and my son *T B*, executors of this my last will and testament; and after my just debts and funeral expenses are paid, then the surplus of my *effects*, both *real* and personal, to be equally divided, to my executors which shall be then living; and they took the fee.

In another case (e), the fee passed under a gift of all the testator's estates and effects whatsoever and wheresoever, in trust, to pay funeral expenses and debts; and then subjecting his said effects, bequeathed to *E F*, to the following legacies; enumerating, among these, a gift to *W S* of the house his father then dwelt in, at the decease of his said father; and giving to the father an annuity, and to the son a sum

(c) 2 M. & S. 453.

(d) 2 New Rep. 343.

(e) *Doe lessee of Franklin v. Trout*, 15 East, 394.

of money, and giving other pecuniary legacies ; and then, (after desiring all the above legacies to be paid out of his effects, by the said *E F*,) giving all the rest and residue of his said effects to the said *E F*, her heirs and assigns, for ever.

But in *Doe ex dem. Hick v. Dring* (*f*), the gift was of all and singular the testator's effects, of what nature or kind soever. Though the will was attested by three witnesses, and no real estate was devised by any other clause, and because the gift was, by the word effects, "*denuded of all context*," the Court decided that it did not extend to real estate.

So in *Doe ex dem. Spearing v. Buckner* (*g*), the word *effects* did not carry the fee, because the context demonstrated that personal estate only was the subject of the will.

In *Camfield v. Gilbert* (*h*), a person seised in fee of real estate, by her will, first made a disposition of her real estate to two persons for life, reserving a rent-charge out of the same, payable first to her uncle for life, and then to her heir at law for life, which, together with the repairs during the term, should be considered as his rent for the said farm ; and afterwards she proceeded to make a disposition of her personal property, and then bequeathed and devised all the rest, residue, and remainder of *her effects*, wheresoever and whatsoever, and of what

(*f*) 2 Mau. & Sel. 448.

(*g*) 6 T. Rep. 610.

(*h*) 3 East, 516 ; and *per* Lord Ellenborough, 2 M. & S. 454.

nature, kind, or quality soever, (except her wearing apparel and plate,) to certain nephews and nieces, to be equally divided between them by her executors; and it was held, that the reversion in fee in the real estate did not pass by the residuary clause, but descended to the heir at law, although he had a rent-charge devised to him, for his life, out of the same estate in the hands of the tenants for life. It was said, the principal stress is laid upon the word *effects*; but that word stands alone, and nothing is added to alter its usual signification; as in *Hogan v. Jackson*, where the word *real* was used together with it. But in its natural signification, it means *personal* effects. The only other word relied on as carrying the real estate, is *devise*, which, though technically considered, is more applicable to real than personal property, might yet be easily mistaken for *bequeath* by an uninformed testatrix; then what precedes, what follows, and what is excepted out of the residuary clause, all relate to personalty. The words, "of what nature, kind, or quality soever," may indeed be said to import realty as well as personalty. But, considering the different articles of personal property before enumerated, it is plain that she meant merely to express, in general words, the whole remainder of her personal property, instead of mentioning each article specifically, as she had before done.

Finally, any other term or phrase of a col-

lective import, which can, in sound interpretation, and consistently with the apparent intention of the testator, be applied to real estate, will receive a construction under which it will embrace property of that description; and whenever it comprehends real property, it will pass the fee of that property, unless there be words of restriction limiting some other estate.

Thus, a devise of all a man's *concerns* has been held sufficient to pass the fee (*i*).

And in *Hopewell v. Ackland* (*k*), a man devised all his goods and chattels, money and debts, and *whatsoever else he had not disposed of*; and on the ground, that the latter words could not have any effect on the personal estate, because that was given as fully as possible by the precedent words, it was held, that the words noticed by italics, must extend to remainders in fee, of estates previously devised for particular estates; and that this construction was enforced by subsequent words directing the payment of debts.

And the like construction was made on a case cited in *Forrester's Reports* (*l*), in which the words of devise were, "*and whatever else I have in the world.*"

And in *Huxtep v. Brooman* (*m*), the words

(*i*) Cited Cas. temp. Talb. 286.

(*k*) 1 Salk. 239.

(*l*) *Hopewell v. Ackland*; Com. Rep. 164; Cas. temp. Talb. 286.

(*m*) 1 Bro. Ch. Cas. 437.

"*all I am worth*," without any introductory clause, were held to pass the fee of the testator's real property.

The like proposition is established by *Goodtitle* ex dem. *Paddy v. Maddern* (n).

The devise was, "of all the rest I have in the world, both houses, lands, goods and chattels, &c. to my wife, my executrix; so that she shall sell my stock in trade, and household goods, and if these will not pay the debts, she shall sell next the house of fee in *Penzance*, &c. so that my executrix shall pay in good time all lawful debts." And the fee passed; partly on account of the comprehensive words, and partly by reason of the personal charge on the devisee, and the necessity of her taking the fee as the means of sale.

And by Sir *William Grant* (o), it was admitted, the words, "what I die possessed of," are sufficient to describe all property of whatever description.

On *Hopewell v. Ackland* (p), Ch. J. *Gibbs*, after stating the words of gift, observed, "It was held, that those words, 'whatsoever else I have in the world, not before by me disposed of,' carried land, notwithstanding that they were preceded by the words, goods, chattels, monies, and debts. And it was rightly so decided; for the testator, in the earlier part of his will, disposes of land; but there is not a

(n) 4 East, 496.

(o) 8 Ves. 607.

(p) 7 Taunt. 81.

preceding word at all referring to personal property. He had, in a former part of his will, disposed of land; he had not disposed of any thing but land; it was, therefore, necessarily his intent to dispose of such land as he had not before disposed of." And the Ch.J. approved of *Huxtep v. Brooman*, because the words, 'all I am worth,' were a substantive bequest, and stood independent of the clause which gave the personalty.

Also, from a context, the words "*what is left*," after my debts paid, may pass the fee (*q*).

In *Pitman* and another v. *Stevens, Newte*, and others (*r*), the testator gave, by these words: "I give and bequeath all that I shall die possessed of, real and personal, of what nature and kind soever, after my just debts are paid. I do hereby appoint Captain *Robert Preston* my residuary legatee and executor."

And the Judges of the Court of King's Bench certified, that *Robert Preston* took an estate in fee."

While, in *Timewell v. Perkins* (*s*), the words, "any other thing whatsoever or wheresoever," were not extended to the residuary real estate, because they occurred in a sentence giving all those my freehold lands and hop-grounds, with the messuages or tenements, barns, &c.

(*q*) *Beachcroft v. Broome*, *infra*.

(*r*) 15 East, 505.

(*s*) 2 Atk. 102.

in the tenure of *L*, and all other the residue and remainder of my estates, consisting in money, plate, jewels, leases, judgments, mortgages, &c. or in any other thing whatsoever or wheresoever, and because other words were not a full description of the personalty.'

So a devise was of the residue of what the testator should *die possessed of*, or in expectancy, of what nature or kind soever, in *Jamaica*, or any other country, to his wife, *E. Saunders*, for her natural life, reserving to her full power to will away any part or proportion of his said residuum at her decease. And after that period, he bequeathed the residue of what was undisposed of by his wife, to his daughter, and the heirs of her body for ever. It was held, that the wife had a power of appointment over the whole residuary estate (*t*).

The word *substance* may also, under circumstances favorable to this application of the term, pass real property, and as a collective term, the inheritance thereof (*u*).

Even the word *legacy*, though in its natural and ordinary import, it is restricted to personal estate, may, from a context, be referrible to real estate; and then, being a term of a collective import, it would pass the fee of real estate.

An instance of this application of the term

(*t*) *Cook and Wife v. Ferrand and others*, 7 Taunt. 122.

(*u*) 3 Bro. Ch. Cas. 347; Cowp. 299.

may be found in the case of *Doe v. Chapman* (v).

In some counties, and particularly in *Devon*, the word *land* is used in opposition to the word LEASE (x). Thus, when a man speaks of lands of inheritance, he describes them to be his *land*; while, if they are *leasehold*, he would say, his lease, or, conversely, the *land* of the lessor, or owner of the inheritance. Whether a devise of the land of a particular farm, for instance, *Sparkwell*, will pass the fee and inheritance of that farm, is a question which has been much agitated. By the opinion of gentlemen of the most distinguished eminence, and among them Lord *Ashburton*, and Mr. J. *Wilson*, this word, used in its *provincial sense*, is descriptive of the inheritance, and will pass the same; especially if the gift be by these, or the like contrasted terms: I give the lease of *Alscott* to *B*, and the *land* of *Sparkwell* to *C*: for the contrast points to the provincial use of the term land.

Also, the word *profits*, or the word *rents* (y), may pass the subject.

But it never has been decided, that either of these terms would carry the fee (z).

And yet the word *profits* is a collective term; and, if used in a collective sense, as descriptive

(v) 1 Hen. Black. 223; 1 Burr. 268; *Hardacre v. Nash*, 6 Term Rep. 716.

(x) 1 Ves. jun. 79.

(y) 2 Ves. & Bea. 74.

(z) But see *infra*, on the word "quit-rents."

the fee pass, even in those cases in which there is an introductory clause, unless the words in the clause of devise import, in substance, more than merely a description of the property given by the will.

Hence the observation of Mr. Justice *Buller*, in *Smith v. Coffin* (c), that “where it is apparent, in the introductory part of the will, that the testator meant to dispose of the whole of his property, and the expressions in the residuary clause may include a real estate, that clearly is to be taken in the largest sense, in order to correspond with the introductory part.”

And it was admitted by Lord *Kenyon*, that general introductory words in a will, as ‘touching my temporal estate, &c.’ though they have some effect in the construction of the will, are not of themselves sufficient to extend a devise to pass the fee (d).

Also, in *Frogmorton* lessee of *Brampston v. Holyday* and others (e), Lord *Mansfield* observed, “That the testatrix has declared her intent to devise her worldly estate. That certainly will not make the will carry an estate that is clearly omitted; but if it be dubious, whether the word estate is omitted or not, it will help the interpretation. But, in this case, it was agreed, that *circumstances twisted together, will*

(c) 2 H. Black. 444.

(d) *Goodright v. Stocker*, 5 Term Rep. 13; *Doe v. Buckner*, 6 Term Rep. 612.

(e) 1 Black Rep. 539; 3 Burr. 1618.

interpret a devise to be a fee, which, on the face of it, is only for life. The cited case of *Grayson v. Atkinson*, depends on its special circumstances ; and the decision is to be referred to the same ground."

And in *Wright or Shaw v. Russell* (f), the words of the introduction to the will were, "As touching the disposition of all such *worldly estate* as it hath pleased God to bestow upon me, I give, &c." then the testator gave a house to his grandson *Henry*, and after his decease, to his two sons, *Thomas* and *William*, and then devised to *Thomas Ebb*, the husband of the heir at law, one shilling. The question was, whether *Thomas* and *William* took an estate for life, or in fee? And the Court decided, that they took an estate for life only.

And in *Frogmorton* on the demise of *Wright v. Wright* (g), the testator, *as touching the disposition of all his temporal estate*, as it had pleased God to bestow upon him, gave and disposed thereof as follows ; first, he directed all his debts and funeral charges to be paid and discharged ; and then he introduced a devise, in these words : "I give unto *Henry Wright* and *Nathan Wright*, my nephews, two houses at *Bank* in *Leeds*, with a croft and appurtenances belonging to them, to be equally divided between them. *Item*, I give unto *William Wright*, my nephew, two houses at

(f) In Exch. H. 1761, cited in *Denn v. Gaskin*, Cowp. 657.

(g) 3 Wils. 414.

Seacroft, with a croft and appurtenances belonging to them, now in the occupation of *John Carter* and *Elizabeth Thornton*;" and afterwards, he bequeathed several legacies. It was contended, that *William Wright*, the nephew, took an estate in FEE. Lord Ch. J. *De Grey* delivered the opinion of the Court. He said, "There is no case where the testator makes use of those or the like words, 'as touching the disposition of all my temporal estate, I give and dispose thereof as followeth,' and immediately afterwards devises his several estates, or several lands, to divers persons, that ever was held to carry a fee. 'All my temporal estate, I give and dispose thereof, as followeth,' and then he describes the estate or land, and gives to his nephews, *Henry* and *Nathan*, two houses and a croft at *Bank* in *Leeds*, and to his nephew, *William*, two houses and a croft, at *Seacroft*, which words *are only descriptive of the particular estates or lands*, as to locality, not of the quantity of his estate in those lands, and so do not carry a fee. It may seem probable, that the testator's intention was, that his nephew, *William*, should have a fee; but, it is a clear rule, *that there must be express words, or a necessary implication, to disinherit the heir at law*. Neither of these appear in the present case, and therefore, the legal operation of the words of the will must govern. By the words, 'all my estate,' he must be understood to mean the thing, *viz.* his lands, and not the quantity of interest,

(a fee,) which he had in those lands. There is a great difference between the description of the thing, estate, or lands devised."

After making some general observations on cases in which a fee will pass by construction, he continued to observe, that it did not appear, in this case, that the testator had charged the lands in question with any debts. He desired his debts to be paid, but did not say out of what estate. Upon the whole, he declared himself of opinion, that *William*, the nephew, took only an estate for life.

And in *Loveacres v. Blight (h)*, Lord *Mansfield*, agreeable to the opinion he formerly delivered in the cited case of *Frogmorton v. Holyday* and others, said, "If the intention of the testator is doubtful, the rule of law," [requiring words of limitation,] "must take place: so if the Court cannot find words sufficient to carry a fee, though they should themselves be satisfied, beyond *the possibility of a doubt*, as to what the *intention* of the party was, they must adhere to *the rule of law (i)*."

"Now, though the introduction of a will, declaring that a man means to make a disposition of all his worldly estate, is a strong circumstance, connected with other words, to explain the testator's intention of enlarging a particular estate, or of passing a fee, where he has used no words of limitation, it will not do alone. And

(h) Cowp. 352.

(i) *Kellett v. Kellett*, 3 Dow's Rep. 248.

all the cases cited in the argument, to show that the introductory words, in this case, should alone be sufficient, fall short of the mark, because they contain other words, clearly manifesting the intention of the testator to pass a fee. The question is *always a question of construction, and depends upon observations naturally arising out of the will itself.*"

In *Denn v. Gaskin* (j), the will was, "As to all such worldly estate as God hath endued me with, I give and bequeath as follows: I give, bequeath, and devise, all that my freehold messuage and tenement lying, &c. together with all houses, &c. reputed as part thereof, or belonging to the same, unto *M R*, *G R*, and *T R*, equally to them, my sister's sons." The testator, in a subsequent part of his will, after bequeathing several small pecuniary legacies to most of his relations, gave *his heir at law* a legacy of ten shillings; and gave to his said sister's sons, all the rest of his *goods, chattels, and personal estate*. And on the question, whether the fee of the messuage and tenement devised by the will, passed to the testator's sister's sons, for an estate for life or in fee, Lord Mansfield said, "It is settled in devises, as well as in deeds (k), that if no words of limitation are added, the devisee can only take an estate for life, because the law implies a life-estate only, where there are no words of limitation. But as there are no technical words

(j) Cowp. 657.

(k) *Supra*.

necessary in a will, if the testator makes use of what is tantamount ; as, if he says, ‘ I give to such a one *in fee-simple,*’ or, ‘ *all my estate,*’ that will carry all his interest in the land devised. But *there must be words in the will to controul the rule of law,* which, I believe, in a variety of cases, thwarts the intention of the testator. I suspect extremely, that in this very case, the testator meant to give his nephews a fee in the premises in question, for he had no other landed property. He makes them residuary legatees of his personalty, and gives a *disinheriting* legacy to his heir at law, agreeably to the vulgar notion taken from the *Roman law*, that an heir is cut off with a shilling ; because, by the Roman law, a will that passed by the heir was called *inofficiosum testamentum*. But the single question is, whether we can find any words in the will, to take this case out of the rule of law ? If we cannot, it must be adhered to. I think it impossible to find words in this will, sufficient to control the rule of law. *If the testator had any way connected the introductory part, ‘ as to all my worldly estate,’ with the devise in question, it might have done ;* but the introduction is only this, ‘ as to all such worldly estates as God hath endued me with, I give to A. B. &c. so and so.’ Suppose he had given half his property by this will, the introduction would still have been proper ; so if he had given the whole of his landed estate only, without ‘ disposing of the residue of his

personalty, it would have been equally proper. He does not say in the introduction, that he means to dispose of all his worldly estate, but '*with respect to it,*' he devises so and so. If he did mean it, the misfortune is, that *quod voluit non dixit*. Great use has been made of this sort of introduction in wills, in favor of the clear intention of the testator, and more in favor of creditors to make a real estate liable to debts. If it were possible to borrow aid from it in this case, as I strongly incline in favor of the devisees, I would do it, but *there are no words that can connect the devise of the lands in question with the introduction in this case, so as to pass the whole interest*; therefore the devisees can only take an estate for life." And by *Aston*, "I really think, from the circumstance of the testator's giving ten shillings to his heir at law, he meant to disinherit him; but that alone is not sufficient." And in support of this position he stated the case of *Shaw v. Russell*; and concluded, that the rule of law must prevail; and judgment was given accordingly.

And in *Right lessee of Mitchell and Wife, v. Sidebotham* and another (1), *William Sparrowhawk* devised in these words, as far as the words are material; "For these worldly goods and *estates* wherewith it hath pleased Almighty God to bless me, I give and dispose in manner following: "*Imprimis*, I give and bequeath to my sister, *Susannah Mitchell*, one shilling. *Item*,

(1) Doug. 734.

I give and bequeath unto *John Mitchell*, son of *Susannah Mitchell*, one shilling, to be paid by my executrix, hereinafter named, within three months after my decease. *Item*, I give and bequeath to my loving wife, *Susannah Sparrowhawk*, all the rest of my goods and chattels, and personal estate whatsoever. *Also*, I do give and devise unto *Susannah Sparrowhawk*, my said wife, her heirs and assigns for ever, all my lands lying, &c.” And in an immediate, but distinct (*m*) sentence, (for so it was held by the Court,) he devised in these words: “And I give and bequeath to my loving wife aforesaid, all my lands, tenements, and houses lying, &c.” without adding any words of limitation: and then he said, “Lastly, I do make and constitute *Susannah Sparrowhawk*, my said wife, full and sole executrix of this my last will and testament.”

On a special verdict, the question was, “whether the last-mentioned premises in the will were, by the true construction thereof, devised to the widow in fee or only for life?” And by Lord *Mansfield*, “I verily believe, that in almost every case where, by law, a general devise of lands is reduced to an estate for life, the intention of the testator is thwarted; for ordinary people do not distinguish between real and personal property. The rule of law, however, is established and certain, that *express words of limitation, or words tantamount, are necessary to pass an inheritance: ‘all my estate,’*

(*m*) See *Collings v. Ewestall*, 4 Mau. & Selw. 58.

or 'all my interest,' will do; but, 'all my lands lying in such a place,' is not sufficient. Such words are considered as merely descriptive of the local situation, and only carry an estate for life. *Nor are words tending to disinherit the heir at law sufficient to prevent his taking, unless the estate is given to somebody else.* I have no doubt but that the testator's intention here was, to disinherit his heir at law, as well as in the case of *Denn and Gaskin* (n); and the only circumstance of difference between that case and this, and which has been relied on as in favor of the defendant, [who claimed under the will,] if the testator had any meaning by it, (which I do not believe ~~he had~~,) rather turns the other way, because he uses different words in devising two different parts of his estate. I think we are bound by the case of *Denn v. Gaskin*, and the other (o), cited in that case by Mr. *Aston*." And judgment was given for the plaintiff, who derived his title under the heir at law.

And in the case of *Goodright* on the demise of *Baker v. Stocker* (p), there was this introductory clause: 'As touching all such temporal estate of lands, goods, and chattels as God hath endued me with;' and there were words of devise which, (from the circumstances attending them,) were held sufficient to pass the fee. And Lord *Kenyon*, Chief Justice, ob-

(n). *Supra*, 197.

(o) *Shaw and Russell, supra*, 194.

(p) 5 Term. Rep. K. B. 13.

served, "That though the general introductory words in this will would have some effect in the construction of the subsequent devises, as was said by Lord *Talbot*, in a case before him (*q*), *they would not of themselves have carried the fee.*"

The cases in which the effect of an introductory clause has been considered, and the opinions delivered on the greater part of these cases, are fully set forth; for this reason, a very few observations on the rule of construction, applicable to these cases, appear to be necessary.

The introductory clause is to be taken into consideration in those instances only in which the intention of the testator is not clear, from the words in the clause of devise (*r*); and in those instances, it is properly considered as a medium (*s*) by which the intention may be discovered, and as furnishing evidence to guide the Court in their construction of the ambiguous words of a gift in the will.

That the introductory words may avail, the words of devise must not be confined, either to articles of personalty, or to a *mere description of particular* lands, or to lands, or other species of real property generally. That the words of the introductory clause may be relevant, so as to be material to, and aid in the construction, it is also necessary that the words of devise should

(*q*) *Ibbetson v. Beckwith*, Cas. temp. Talb. 160; *Maudy v. Maudy*, 2 Str. 1081; *Doe v. Buckner*, 6 Term Rep. 610.

(*r*) 2 H. Black. 444.

(*s*) P. 193.

not in themselves be *strictly proper*, in their primary or genuine signification, to pass the inheritance of real property ; at the same time that, in their largest sense, they may be understood to extend to real property, and to pass the same for an estate in fee. In short, that the introductory clause may be decisive of the effect of the will, the words in the devising clause must be capable of two constructions, and in one of them be applicable to real property. This was the point of view in which Mr. Justice Buller considered the cited case of *Smith v. Coffin* (t).

In another case, Mr. Justice Buller said, " As far as a rule can be laid down, whenever it appears, by the introductory clause, that the testator means to dispose of all his property, and all his estate in his property, and the words in the devise are connected in sense with the introductory clause, the words of the devise are to be taken in their larger sense, to correspond with the introductory clause."

In proposing the rule of construction on wills in which the words of the introductory clause, when there is one, are material, it is to be understood, that the words of the will, in the clause of devise, must import something more than a mere description of property, in regard to situation, and that they must be connected in words and in sense with the introductory clause.

(t) 2 H. Black. 444; *supra*, 193.

This conclusion is warranted by the cases of *Shaw* and *Russell*, *Denn* and *Gaskin*, and *Mitchell* and *Sidebotham*. It is also to be inferred from all the other cases, particularly from an expression of Lord *Hardwicke*, in *Grayson* and *Atkinson*, in which he supposed the introductory clause to disclose an intention to give a *fee*, and the clause of devise not to contain any words which could, without the aid of the introductory clause, be deemed descriptive of an interest of that extent. In his emphatical manner, he said, "Intent, at first, is one thing, and the execution of that intention is another (*u*).

These cases, however, do not, in express terms, go the length of deciding whether it be necessary that the clause of devise should contain words, which of *themselves* are sufficient to pass the inheritance. Taking all the cases into one view, the inference to be drawn from them, as far as their determinations, and the reasons assigned for these determinations, afford any inference, is, that words, which without any introductory clause, would not be construed to extend to real property, or to describe the quantity of interest to be taken in property of that sort, will, with the addition of an introductory clause, intimating an intention, on the part of the testator, to dispose of all his *estate*, his *property*, or *substance*, with a view to a com-

(*u*) 1 Wils. 334.

plete disposition of all his interest in the same, be deemed to apply to real property, and give a title to the inheritance.

The case of *Grayson and Atkinson* (x), may, with propriety, be adduced in support of these positions. In *Grayson and Atkinson* the words of devise were, 'As to all the rest of my goods and chattels, real and personal, moveable and immoveable, as houses, gardens, tenements; my share in the Copperas Works, &c. I give to the said A." And it was held, that the fee passed by the devise.

It is impossible to contend that the fee would, in this case, have passed by the words of the devise, without the aid of the words in the introductory clause.

This conclusion on the application and effect of words in an introductory clause, is the only conclusion which can be drawn from the cases on which the Courts of Law and of Equity have pronounced their judgments, and on which the respective Judges, who have presided in these Courts, have delivered their opinions.

From the disposition, however, shown by the Courts, in modern times, to give every indulgence to the will of a testator, as often as they can discover his meaning, from any expression, it is probable that, even in cases similar to those in which great stress has been laid on the words in the introductory clause, and the determina-

(x) 1 Wils. 333.

tions have in part, if not wholly, been founded on the intention expressed in these clauses, the like determinations would hereafter be made on the mere words of devise, independently of the words in the introductory clause.

On the whole, an introductory clause in a will is a *key* to the intention of a testator, and, in its application to the words in a clause of devise, is of the same effect as the preamble of a statute is to the enacting part (*y*). It may explain the intention, when it is doubtful, and cannot extend the meaning beyond the *express* words. It therefore must be understood, that the words of devise are of a nature and tenor, that in a general, though not in their most obvious sense, they extend to real property; and, in a collective sense, are descriptive of the testator's interest in that property.

And notwithstanding there be introductory words, and words of devise, sufficiently ample to carry real estate, yet a context may deny to these words of devise, the construction under which they would pass the fee.

In *Doe ex dem. Snell v. Allen* (2), the word *hereditaments* did not pass the fee, although the devise was, "of all my messuages, lands, tenements, and *hereditaments* in *S*, &c. to *A*," preceded by an introductory clause, in these terms: "As to what real and personal estate it has pleased God to bless me with (all my debts, &c.

(y) 1 Black. Com. 535.

(z) 8 Term Rep. 497.

being first paid out of my personal, and if that is not sufficient, out of my real estate,) I give and dispose of the same as follows."

As to the cases of the third general head, that a fee will pass by a devise in a will, when,

1st, The purpose of a trust the testator has created cannot certainly be performed ;
or,

2d, An act he has directed to be done cannot certainly and effectually be accomplished ; or,

3d, A charge he has imposed cannot in *point of estate*, be sustained ; unless it be decided, that an estate in fee is devised.

Although no estate be limited by express words, yet to charge the land with a trust which cannot be performed, or to direct an act to be done which cannot be accomplished, by means of the interest of the devisee in the land, unless more than an estate for his life pass to him, is, in wills, in which the intention governs the construction, and in the absence of words of express limitation (*a*), equal to a declaration, that the person designated to execute the trust, or perform the act, or bear the charge, should have the fee.

This, in intendment of law, (when the law is to act on its own presumptions,) is the only estate sufficient to answer these purposes.

In cases with these circumstances, and al-

(a) 15 East, 162, 170.

though no words of limitation be added to extend the interest, by express words, to the devisee and his heirs, the intention that the fee shall pass, is so demonstrably clear, that it calls for a construction which would fulfil that intention.

The testator, by expressing it to be his will that this or that act should be done with his land, or by means of the estate which it is his meaning to give in the land, shows that he would have used the proper words, if he had been aware they were necessary ; and as, in the first case, the trusts he has expressed could not be performed ; and, in the second case, the act he has directed to be done could not be accomplished ; and, in the third case, the charge he has created could not be effectual, unless he has given an estate of sufficient extent, to enable the devisee to fulfil the trusts, perform the act, or answer the charge, it follows, that the testator must have meant that the devisee should have an estate in fee ; and, on the presumption of this intention, he will have an estate of that extent. For to order that to be done by the devisee which he could not do, unless the means of fulfilling the testator's will were supplied, is a declaration of an intention that the means should not be wanting ; and this is all the law requires.

In *Shaw v. Wright*, or *Weigh*, or *Way* (b), it was held, that when lands are devised to

(b) Fitzgibbons, 7 ; 1 Eq. Ca. Abr. 184. by the name of *Shaw* and *Weigh*.

trustees, without any words of limitation to support the trust of *estates of inheritance*, the trustees must, by implication of law, have an estate of inheritance sufficient to support the trust; for there is no difference between a devise to a man *for ever*, and upon trusts which *may continue for ever (c)*. In this case, the devise was to a wife for life; and for her better support; the testator also devised to her 500*l.* to be raised by sale of timber, or digging of coal; and after her decease he devised the premises to three trustees, and the survivor of them, in trust for his two sisters, equally between them, during their natural lives, without committing any manner of waste; provided, that whatever part of the 500*l.* should be paid his wife by either of his sisters, the same should be reimbursed to them, by getting of coal upon the premises; and if either of his sisters should happen to die, leaving issue, &c. then estates of inheritance were limited. And it was argued by the counsel for the plaintiff, and admitted by the defendant's counsel, and by the Court, that a fee passed, though the devise was to the trustees, and the survivor of them, without the word *heirs*, or *for ever*; because the carving out so many estates of inheritance, that were to be served out of the trust, showed the intent of the devisor to give the trustees an estate in fee; since nothing else could be sufficient to satisfy all the trusts.

(c) 2 Str. 798; 2 Atk. 577.

And in a case (*d*) before Lord *Hardwicke*, while Chancellor, he said, "If land be given to a man without the word heirs, and a trust be declared of that estate, and it can be satisfied by no other way but by the *cestui que trusts* [read trustees] taking the inheritance, it has been construed that a fee passes to him [read them] even without the word heirs."

And in *Bagshaw* and *Spencer* (*e*), Lord *Hardwicke*, speaking of the devise to the trustees, observed, "That part of their trust was to sell the whole or a sufficient part of the testator's real estate, for payment of his debts and funeral expenses: that this would have carried a fee by construction, had the word heirs been omitted out of the devise, because the trust was to continue for ever, and to sell and convey a fee: that this was the opinion of the whole Court of King's Bench, in *Shaw v. Weigh*, and not disputed upon the writ of error in the House of Lords: that if they might sell the inheritance in the whole or any part of the lands, not by force of a power, but by virtue of *their estate*, they must at law have a fee in the whole; for otherwise it must, from the nature of the thing, be uncertain what they have occasion to sell."

Also, from several cases stated in former pages of this chapter, it will have been collected,

(*d*) *Villiers v. Villiers*, 2 Atk. 72; *Gibson v. Ld. Montfort*, 1 Ves. 491, S. P.; Amb. 93, S. C.

(*e*) 1 Coll. Jur. 382; 2 Atk. 577.

that to give a general power of disposition, and not to limit any estate, amounts to a devise of the fee, to enable the person to whom the right is given, to make the disposition, and enjoy the property in the mean time.

So in *Markham v. Cooke (f)*, *George Beaumont* gave several sums of three pounds a year to divers persons; to some *for life*, to others in fee, and expressly directed that one of the annuities devised in fee, should be paid by his *trustee or executor*, and afterwards added, “these legacies to be faithfully paid *by my trustee, John Cook, every year*, and yearly, a month after *Martinmas*.” He then gave several small legacies, and willed and devised, that *William Frith* should not be removed from his farm upon any account whatsoever, during the term of his natural life, he paying the same rent as usual; and that, upon his leaving the farm, whoever came into it, should pay after the yearly rent of nine pounds. Then, immediately following, was this clause, “I do also leave unto my trustee and executor, out of the yearly rents of the farm, one pound and ten shillings a year and yearly, for repairs and other uses.” He afterwards left to his trustee and executor three pounds for sawing out, &c. and three pounds to build a tomb for him in *Tankersley* church-yard, and directed him and *his heirs (g)*, always to see that it was kept in

(f) 3 Burr. 1684.

(g) See 3 Ves. & Bea. 160.

order. Afterwards, he gave several directions and legacies, and constituted *John Cook*, before-named, sole EXECUTOR and TRUSTEE of that his last will and testament, he paying all his just debts, legacies, and funeral charges. And it was held, that *John Cook* was entitled to the fee under the will. And by Justice *Wilmot*, "Here are trusts to be exercised, which the trustee cannot execute and effectuate, without having an estate in fee decreed to him." And *Yates*, Justice, added, "That the estate must be co-extensive with the charges, and that there were annuities charged upon the real estate, and devised in fee."

On this case it is observable, that *John Cook* might have taken the fee, from the circumstance, that he was to be the testator's *executor* or *trustee*; and that, from the terms in which the annuity in fee was devised, it appeared that he was to pay this annuity, and he would not have had any fund adequate, in point of estate, to the payment of this annuity, unless it had been decided, that the lands passed to him in fee. It is also observable, that some acts were to be done by him and his *heirs*; and in a recent case (*h*), this circumstance had its weight.

And in *Baddely v. Leppingwell* (*i*), *Thomas Ives* devised his copyhold tenement in *Castle Hedingham*, to *Clement Boreham*, for his natural life, he paying thereout yearly and every year, by

(*h*) *Charlton v. Taylor*, 3 Vea. & Bea. 160.

(*i*) 3 Burr. 1533.

half-yearly payments, &c. and gave and bequeathed two other copyhold tenements, consisting of two cottages and a herb-garden, of the yearly value of five pounds and six shillings, to *Sarah Boreham, she paying thereout forty shillings a year to her sister J. Boreham.* On a question, whether *Sarah Boreham* took the fee of the two copyhold tenements devised to her, it was held, that she took an estate of inheritance; partly on the penning of the different clauses of the will, (there being added words of express limitation to one devise, and the words of devise to *Sarah* being left to the construction of law,) but principally because the annuity to *J.* was payable for the life of *J.*; and it would not have been in the power of *Sarah Boreham*, the devisee of the tenements charged with this annuity, to pay the annuity, unless she had a larger estate than for her own life, since she might have died, and her estate, if for her own life, have determined in the life-time of her sister, the annuitant.

The like determination was pronounced in the more ancient case of *Read v. Halton (k)*.

In that case a devise of land of the yearly value of sixteen pounds was made, upon condition that the devisee should pay to his two sisters five pounds a year; and it was held, that the devise passed the fee, without words of limitation in the will.

(k) 2 Mod. 25; *Spicer v. Spicer*, Godbolt, 28; Cro. Jac. 527; 2 Roll. Rep. 80.

The reason of the decision is reported to be, that the estate being charged with payments to the sisters, during their lives, clearly proved the intention of the testator to have been, that the devisee should have an estate in fee-simple.

Also, in *Lee v. Withers* (1), the testator devised to his son the lands which the testator had purchased of *J S*; and to *James*, his son, the lands which he had purchased of *J N* (being found to be of the value of twenty pounds a year,) conditionally, that *James* should allow *Nicholas*, another son of the testator, and for whom no other provision was made by the will, *meat, drink, apparel, and convenient lodging*, during his life; and it was resolved by the Court, that the fee was devised to *James*; for *Nicholas* might have maintenance immediately, which should be a charge to *James*, before any profits might be received.

Though the reason be applicable to the next class of cases; yet the case also belongs to that class of cases which is now under examination.

Also, in *Loveacres v. Blight* (m), *John Mudge*, as touching such worldly estate wherewith it had pleased God to bless him in this life (for these were the introductory words to his will,) gave, devised, and disposed of the same, in manner following; and first of all he gave and be-

(1) T. Jones, 107.

(m) Cowp. 352; also *Beezley v. Woodhouse*, 4 Term Rep. 89.

discover the intention of the testator, the Court may *supply* it.

“ Now, the most obvious word to be supplied here, as it strikes me, is the word *request* : at her request, would make the sense complete. Then, as to the devise itself, the five pounds is directed to be paid by the executors, *out of the estate*, and the wood is to be provided, at all events ; it therefore must be supposed to be brought home from off the estate. But if the executors were to take only an estate for life, they would not be able to pay the annuity during her life out of the profits only, or furnish all the wood she might want, because the stock on this estate might fall short. It is but reasonable, therefore, to infer, that such an interest was intended as would enable them to comply with the testator’s directions fully and completely in every respect. The next observation arises upon the words, ‘ whom I make my and ordain my,’ &c. The word *my*, without some addition, means nothing at all. It cannot mean executors, because the testator has expressly inserted that word afterwards. It seems therefore, most proper to insert the word *heirs*. But I rest *upon the other grounds*, rather than upon the conjecture, how the blanks should be filled up. The last observation is to be drawn from the words ‘ *freely to be possessed, &c.*’ Now, the word *freely* strikes me as a very material word ; for the testator has charged the estate with the payment of the annuity to his

wife, &c. so that he could not mean by the word *freely*, to give it free from incumbrances. The free enjoyment, therefore, must mean *free from all limitations*; that is, the absolute property of the estate. Upon these observations, arising on the face of the will itself, coupled with the introductory clause, he declared himself of the opinion, as did the whole Court, that the will passed the estate of the fee."

In introducing these observations, Lord *Mansfield* said, "If an estate be given to *A*, to be sold for payment of debts and legacies, the purpose to be answered, makes it a fee, without words of limitation; and more generally, that *wherever any thing is directed to be done, which, strictly speaking, an estate for life only may not be sufficient to answer, the Court will imply a fee (n).*"

And in *Goodright* on the demise of *Baker v. Stocker (o)*, already noticed in a former part of this Essay, the testator introduced the devises in his will with these words: "As touching all such temporal estate of lands, goods and chattels, as God hath endued me with, I give, devise, and bequeath thereof, as followeth:" and devised to his godson, *John Baker*, his higher house, being near the Market-place in *Sidmouth*, he paying yearly and every year, *out of the said higher house*, the sum of fifteen shillings unto his grand-daughter, *A. Halstaff*.

(n) See also 2 Atk. 577.

(o) 5 Term Rep. 13.

The point to be decided was, whether the devisee took an estate for *life* or in *fee*? And Lord *Kenyon*, after commenting on the effect of introductory clauses, observed, "That it was very properly admitted, that the words '*paying yearly and every year*,' were sufficient to pass the fee; that the annuity was intended to continue during the grand-daughter's life, (though it is not so expressly mentioned;) and therefore, of necessity, *J. Baker*, the devisee, must take an estate in fee; and that all the doctrine on this subject was to be found in *Baddely v. Leppingwell* (*p*), *Andrew v. Southouse* (*q*), and *Frogmorton v. Holyday* (*r*).

And in *Doe v. Richards* (*s*), *Henry Richards*, after bequeathing a certain leasehold estate (to which he was entitled for the residue of a term of years, determinable on three lives,) to his sister, *Jane Dewdney*, subject to a mortgage, and payment of several sums, devised in the following words: "All the rest, residue, and remainder of my messuages, lands, tenements, *hereditaments*, goods, chattels, and personal estate whatsoever, *my legacies and funeral expenses, being THEREOUT paid* (*t*), I give, devise, and bequeath unto my said sister *Jane Dewdney*, and do hereby constitute and appoint her whole and sole executrix and *residuary legatee* of this my will."

(*p*) 3 Burr. 1533.

(*q*) 5 Term Rep. 294.

(*r*) 3 Burr. 1618.

(*s*) 3 Term Rep. 356.

(*t*) See *Denn v. Mellor*, 5 Term Rep. 558; 4 East, 499.

The question was, whether *Jane Dewdney* took only an estate for life? And by Lord *Kenyon*, Ch. J. "The Court will not, indeed, anxiously seek for words to disinherit the heir at law, though they will endeavour to give effect to the intention of the devisor. In this case, no person who reads the will, except a lawyer, can have any doubt on the meaning of it; for he devises all the rest, residue, and remainder of his messuages, lands, tenements, hereditaments, goods, and personal estate whatsoever, to his sister, and appoints her sole executrix and residuary legatee. I admit, indeed, that *those words alone are not sufficient in law to carry a fee*; but I rely on the words which immediately follow, 'my legacies and funeral expenses being *thereout paid*,' as sufficient for that purpose. For the fund which is to answer those demands ought to *be as ample as possible*. Those charges extend to, and are to be taken out of, the property which was before given to the residuary legatee; and if that devise did not comprise the whole of the devisor's estate, (the *interest* as well as the land) the legacies and funeral expenses might not be paid." And after noticing the case of *Baddely v. Leppingwell*, already cited in this Essay; and that the Court held, that a fee passed by that devise, though there were not any words of inheritance, because the annuity to be paid by the devisee might last longer than his life, he continued to observe, "and as it is plain, that such was the

intention of the testator here (u), I am glad to find the word *thereout*, in this devise, without which the other words would not have been sufficient to give effect to that intention : and I think this is not extending the rule farther than the case I alluded to."

To these observations, Mr. Justice *Ashurst* added, " According to the words of this devise, all the legatees may call *on the devisee* for their demands ; therefore, it must be taken to have been the devisor's intention to give her where-withal to pay them." The other two Justices, *Buller* and *Grose*, concurred : Mr. Justice *Buller* stating, " That the latter part of this will was an additional reason for supposing that the devisor intended his sister should take the fee ; because, after the above devise, he makes her *sole executrix and residuary legatee*."

The counsel, who argued on the part of the heir at law, rested their case on the distinction between a *charge on the land*, and a charge *on the person* of the devisee ; attempting to show, that in the case before the Court, the devisee was not *personally* answerable for the debts and legacies ; and concluding, that the devisee therefore took only an estate for life.

The Court, however, considered the case in a different point of view ; they agreed, that the debts and legacies were charged on the land ; and they concluded, *that the devisee was to pay them out of the land*, and therefore must have

(u) 3 Term Rep. 359.

the fee, as the only estate which would certainly enable her to fulfil the testator's intention.

And Lord *Ellenborough* (v) said, the charge was on the devisee, in respect of the estate in his hands.

From these observations, it will appear, that the last cited case falls under the arrangement of the next as well as the present head of division; at the same time, it furnishes a distinction equally illustrating the law as stated under both heads.

In *Doe v. Richards*, the cases of *Dickins v. Marshall* (x), and *Canning v. Canning* (y), were cited.

In the former of these cases, the testator devised all his lands and goods AFTER his debts and legacies paid, to *Richard Toby* and *Mary*, his children, equally to be divided between them; and in the latter case, the devise was of, &c. "after his just debts, legacies, and funeral expenses are fully satisfied and paid:" and in each case, it was held, that an estate for life only passed (z).

To these remarks it may be added, that in *Doe v. Richards* (a), Mr. Justice *Buller*, in reference to an observation which fell from Mr. Justice *Ashurst*, declared it to be his opinion, that if the devise had been to his sister, "paying

(v) 4 East, 499.

(x) Cro. Eliz. 390.

(y) Moseley, 240.

(z) *Doe v. Ramabotham*, 3 Mau. & Selw. 516. S. P.

(a) 3 Term Rep. 359.

the *legacies*, &c. out of the *rents and profits*," that also would have carried the inheritance ; " for (said he) there is a distinction between a devise to trustees, to pay out of the rents and profits, and out of the *annual* rents (*b*). In the former case, they have a *power* of selling the estate ; not so in the latter."

In *Annesley v. Chapman* (*c*), *William Lock*, who was bound in an obligation, that forty pounds should be paid annually to his wife, during her life, made his will, and devised to his sons, and declared that his devise to them was, *for the purpose that they should contribute part and part alike*, towards payment to his wife, of forty pounds per annum, during her life, which the testator added, *I am bound to pay* ; and because the charge *was not* imposed by *the will* on the wife, it was held, that the will only gave it an additional security, and did not amount to a charge, so as to entitle the *devisees to an estate in fee*. On the propriety of this decision, there is, under the circumstances of the case, great reason for doubt. This doubt was suggested in the former edition ; and the observation of Lord *Kenyon*, in the case of *Andrew v. Southouse* (*d*), strengthens the objection to this determination. In *Andrew v. Southouse*, the devise was in these words : " I

(*b*) 1 Eq. Cas. Abr. 199, pl. 7, 8 ; but see *Denn v. Mellor*, 5 Term Rep. 558.

(*c*) Cro. Car. 157 ; Willes, 659 ; *Goodright v. Stocker*, 5 Term Rep. 13.

(*d*) 5 Term Rep. 292.

give, devise, and bequeath all those my messuages, lands, tenements, and hereditaments in *Whitehill*, late the estate of *T. Christie*, Esq. deceased, and all other my part, share, and interest of and in the estates of the said *T. Christie*, unto my said sister ——— *Andrews*, and her assigns, during *the term of her natural life*; and from and after her decease, I give and bequeath the same unto *E. Southouse*, grand-nephew of my late husband, *charged* and chargeable nevertheless to and with the payment of one annuity, or yearly rent-charge of twenty pounds per annum, to *James Tooth*, grand-nephew to *Christie Southouse*, Esq. and his assigns, to commence from and immediately after my decease, and payable quarterly, by even and equal portions.

The question was, whether *E. Southouse* took an estate for life or in fee?

On the several expressions of the will, it was determined, that he took the fee.

On the part of the heir at law, it was contended, that the land itself, and not the *person* of the devisee, was charged and chargeable with the annuity; and therefore, into whatever hands it might come, the annuity would still remain during the life of *J. Tooth*; nor could any loss accrue to *E. Southouse*, on the other hand, because he would be no longer bound for the payment of it than during his possession of the estate out of which it issued.

But Lord *Kenyon* observed, that it was not indeed to be forgotten, that there were old cases in which the judgments of the Courts in cases of this kind proceeded on more limited grounds than those in more modern times ; the case cited from *Croke*, [*Annesley v. Chapman*,] for instance: and after commenting on the different expressions in the will, he observed, “ Then the words of the devise to *E. Southouse* are, charged and chargeable, nevertheless, with the payment of an annuity of twenty pounds to *J. Tooth* for life. But out of what estate could that annuity be paid, if *E. Southouse* did not take an estate in fee? for the annuity was intended to be for *J. Southouse*’s life, and he might survive *E. Southouse* :” and he declared himself clearly of opinion, that an estate in fee-simple passed to *E. Southouse*. And *Ashurst, J.* added, he should doubt whether, if *E. Southouse* were not to take a fee, and he were to die in the life-time of the annuitant, *J. Tooth*, the annuity would be payable after his death to *J. Tooth*.

Jenkins v. Jenkins (e), proves the same doctrine. It also leads to the conclusion (though that conclusion is less doubtful than the Court treated it) (*f*), that the charge of an annuity for the life of *B*, when the charge is the ground for fixing the measure of the estate of the

(e) *Willes’s Rep.* 650.

(f) *Doe d. Bezeley v. Woodhouse*, 4 Term Rep. 89; *Spicer v. Spicer*, Cro. Jac. 527; *Lee v. Withers*, T. Jones, 107.

the estate of the devisee, should confer a title to the fee, and not merely for the life of *B*.

In that case, the testator gave to *Mary Harper*, "five pounds a year, to be paid to her out of the premises in question, by his executors, as long as she should live, and to be paid quarterly;" and he gave to *John Jenkins*, "all his lands, goods, and chattels, with his money out on bills and bonds," and appointed him sole executor. And it was decided, that the devisee was not tenant for his *own life*.

And *Willes*, Ch. J. in delivering the judgment of the Court, observed, "We found our opinion on this, that as the annuity is to be paid by the executor, and to be paid out of the estate, the intent of the devisor cannot take place, unless the executor has at least such an estate in the lands devised as will last as long as the annuity is payable. Whether he has an estate for the life of the annuitant only, or in fee, we need not determine in this action, because the annuitant is alive; but we are rather inclined to think he took an estate in fee, because there is no one case where a devisee, by virtue of the word 'paying,' has been adjudged to have a larger estate than for his own life, in which it has not also been adjudged, that he took an estate in fee. And in answer to an observation, that it is only said to be paid by the executor, and his heirs are not mentioned, we think that of no weight; for saying, that

his executor is to pay, it is only *descriptio personæ*, and is just the same as if he had said to be paid by *John Jenkins*."

It may also be added, that an estate for the life of the annuitant, would be of less value to the devisee, than an estate for his own life. This consideration decides the judgment of the Courts to raise a fee, rather than an estate *pur autre vie* from the charge.

In *Randall v. Tuchin* (g), the testator bequeathed to *Samuel Groves* and his wife *Hannah Groves*, and the survivor of them, the sum of five shillings per week, to be paid to them weekly, from and out of the estates bequeathed to his niece, *Mary Price*, and her son, *Marinus Price*.

And from this charge, as well as on other grounds, Sir *V. Gibbs* and *Chambre* inferred a fee in the devisees. Sir *V. Gibbs* observed, "It is clear that the testator contemplated that it (the annuity) was to be paid out of that which he had before given to *Mary Price* and *Marinus Price*; and it therefore shows, that he meant a larger estate than for life should pass to them."

Freak v. Lee (h), had carried the doctrine to this extent. The fee passed to the devisee under a will, attended with these circumstances: *Richard Lee* was seised of the lands in question,

(g) 6 Taunt. 410.

(h) Pollexf. 553; T. Jones, 113.

being a tenement in *Pinhow*, alias *Pinn*, of the value of ten pounds per annum, and of other lands in reversion immediately expectant after an estate for one life yet in being, lying likewise in *Pinhow*, of the value of thirty-four pounds per annum, in possession, rent forty shillings per annum: he was also possessed of two other estates and terms for years in *Polslow*, in *Heavitree*; the one determinable on the death of *Jane Way*, in the will named; the other determinable on the death of *Eliz. Gandy*, in the will likewise named.

Richard Lee, being so seised, made his will 29th December 1665, whereby he devised to *John Lee*, twenty pounds, to be paid within two months after his decease, out of his lands at *Pinn*; to *Martha Lee*, fifty pounds, within two years after his decease, out of his lands at *Pinn*; to *Luke Lee*, five pounds, within twelve months after his decease, out of his lands at *Pinn*; and to divers others, in all about one hundred pounds. Then comes this clause: "I do give unto *Richard Lee*, son of *Alice Lee*, all my land at *Pinhow*; and my two leases at *Polslow*, during the natural lives of *Jane Way* and *Elizabeth Gandy*;" and he made *Aliqe Lee* his executrix to see his will executed.

These two cases carry the law to its utmost verge (i).

The full and particular statement given of

(i) See *Roe v. Daw*, 3 Mau. & Selw. 518.

the opinions of the Judges, who determined the several cases introduced under this head, as delivered at the time they pronounced their judgments on these cases, supersedes the necessity of any additional comments.

The observations which fell from the Bench, are the best and surest guide to the interpretation of the rule, and to a perfect understanding of the reasons on which each respective case was determined ; they will lead the student to form an opinion on cases open to the same or similar arguments. One observation, however, may not be inapplicable. The principle on which the cases of this class have been determined is, that if the devisee were to take an estate for his own life, being the estate which the construction of law would give him, independently of the circumstance of the charge, that estate would not, *certainly*, continue as long as a charge to exist for a different period. It therefore follows, that when the language of the will would give an estate of the same extent as the charge, the reason for holding a fee to pass by reason of the charge which is created, will not apply.

“The Courts (*k*), indeed, have gone as far as they could, to give the absolute interest to the first devisee ; but there are certain limits which they have put on their construction of wills, and we must take care

(*k*) 5 Term Rep. 562 ; per Lord Kenyon.

not to transgress them. Where a devisee is directed to pay an annual rent-charge, or a solid sum, to another person, out of the estate devised, it has been properly decided, that the devisee should take a fee, because he might be a loser, unless the estate in his hands were, in all events, sufficient to enable him to bear those charges."

On principle, and also by decision, it is clear, that this rule is applicable to those instances only in which the devise is left to construction or implication. If there be a devise in express terms *for life* (*l*), or in *tail* (*m*), or for years, this express estate cannot, by construction, be converted, by any of the circumstances which are noticed, into an estate in fee.

So by express words, or by words of explanation, a devisee may be merely tenant in tail, although there is a direction to him to grant an annuity.

This decision was pronounced in a case in which there was a devise to one and his heirs, with a limitation over if he died without heirs of his body (*n*).

It is fair, however, to state, that the limitation over was to the person to whom the annuity was to be granted; and yet, it is apprehended, that

(*l*) *Doe v. Trout*, 15 East, 394; *Doe v. Fyldes*, Cowp. 385, and *infra*; *Doe d. Burdett v. Wrighte*, 1 Barn. & Ald. 710.

(*m*) *Nanfan and Wife v. Legh*, 7 Taunt. 85.

(*n*) *Dutton v. Engram*, Cro. Jac. 427.

even in the absence of this circumstance, an estate in tail only would have passed.

As to the cases of the fourth general head, the fee will pass by a devise in a will, when the devisee is made personally liable to the payment of a sum in gross, or an annual sum, or to give, or to relinquish any other benefit, and no estate is limited to him, and consequently, in the intendment of law, he may receive a prejudice (*o*), unless it should be decided that he took an estate in fee.

In the first place, there must be discarded from this class, those cases in which a chattel interest has passed for the payment of debts.

These cases, with the distinctions of which they are susceptible, will be stated in the chapter on Estates for Years.

The leading distinction may be thus expressed: "A devise to *A*, in trust to pay debts, would pass a fee; while a devise to *A*, till the testator's debts shall be paid, would pass a chattel interest only."

And some of the cases arranged under this head, and even *Colyer's* case, (the leading authority for the distinction which governs these cases,) might, with equal, indeed greater propriety, be arranged under the fourth rule.

The rule of construction now under examination, (for it is only a rule of construction,) was adopted at an early period, after a power of

(*o*) *Willes*, 140.

alienation by will was conferred on the owner of the estate; and, to the present time, has continually been observed. Indeed, it is probable, this rule of construction had been laid down prior to the statute of Wills, and applied to devises in wills under customs conferring the power of testamentary alienation, or made through the medium of uses in their fiduciary state (*p*).

The doctrine of the rule itself, and also its extent, are to be explained; and it may be done in a few words; stating the points of difference to be collected from the Reports, and giving an abstract of the more important cases, as often as they elucidate the point under consideration.

That the rule may have application, the subject of property must be devised to the person who is to take under the will.

1st, *generally*; that is, without the limitation of any estate, or any declaration, from which an intention to give a particular estate must necessarily be implied; for if it be particularly expressed (*q*), or must necessarily be implied from the language of the devise, or from words introducing another gift, that the devisee shall have the land, or other subject of property, for

(*p*) 4 Edw. VI. 78, cited Bridg. 105; *Wellock v. Hamond*, 3 Rep. 21; *Merson v. Blackmore*, 2 Atk. 340; *Gibson v. Montfort*, 2 Atk. 72; 1 Ves. 491; Ambl. 93; *Villiers v. Villiers*, 2 Atk. 72; *Bagshaw v. Spence*, 2 Atk. 578; Moore, 853.

(*q*) *Denn v. Slater*, 5 Term Rep. 335.

a *particular time*, either for years, for life, or in tail, this rule will not govern the case.

Nay, even a devise to a man and his heirs and assigns, by express words, subject to a charge, may be reduced to an estate-tail, by a clause which introduces another gift, to commence on his death without issue (*r*).

And if there be a devise to a person and the heirs of his body, chargeable with a sum of money payable by the devisee and his heirs, this devise will not give the fee.

The word heirs will be referrible to the heirs entitled under the intail, and they are the heirs of the body. *Doe v. Fyldes* (*s*), is an authority for that conclusion. In that case, Lord *Mansfield* admitted, "That all the cases in which the implication arising from the condition of paying money was admitted, were cases where the question was, whether the devisees took an estate for life or in fee, and not whether they took an estate-tail or in fee?" And in *Denn v. Slater* (*t*), Lord *Kenyon*, referring to the case of *Doe v. Fyldes*, admitted, "That the law on this subject was very accurately stated by Lord *Mansfield*."

The result of Lord *Mansfield's* statement of the law on this point, (a point equally applicable to the cases in the former division,) is, that where an estate is given *generally*, without

(*r*) *Denn v. Slater*, cited *infra*, on Estates-Tail; *Brics v. Smith*, Willes, 1.

(*s*) Cowp. 835.

(*t*) 5 Term Rep. 336.

adding words which would create a fee, or an estate-tail, and it is charged with the payment of annuities, the devisee takes a fee; but that this was not the case where an estate-tail was given to the devisee.

The object of the Courts, in establishing the rule, was to comply with the presumable or supposed intention of the testator. Of consequence, the application of the rule cannot be required when that intention is expressed by words of precise gift; leaving no doubt of the extent of interest, which it is the intention of the testator to give, or there are words negating the construction which would entitle the devisees to an estate in fee. Therefore, in *Doe v. Fyldes*, Lord Mansfield observed, "That there never was an instance of such an implication, where an *express* estate for life, or, an *express* estate-tail, was given in *terms*, though it may be expressed by words of *desire* (*u*)."

2dly, The charge must be imposed, so that the person to whom the lands are devised may be called on for payment *immediately*, or at some FUTURE TIME, before he will *certainly* have received, out of the profits of the property, the sum he is to pay, or the charge imposed on him.

The person on whom the testator has bestowed his property, is supposed by law to be

(u) *Reeves v. Gower*, 11 Mod. 208; *Ackland v. Ackland*, 2 Vern. 687; *Doe v. Holmes*, 8 Term Rep. 1; *Goodtitle v. Madern*, 4 East, 496; *supra*.

an object of his bounty. The construction most likely to give effect to that intention will be adopted. Were the devisee to take merely an estate for life, under a devise to him, subject to a charge, he, in legal contemplation, might, if he paid that charge, receive a prejudice instead of deriving the benefit the testator is supposed to have intended for him (*x*).

Courts of Justice, when the intention of the testator is left to the construction of law, will not presume, that the devisee is to take the risk of a loss.

A person to whom lands are devised, subject to a charge, may die as soon as he has paid the money imposed by the charge, or shortly afterwards, and before he has received the amount.

Neither the value of the property, nor the time at which the legacy or sum is to be paid; nor the circumstance that the devisee has raised the money out of the rents and profits of the lands before the time of payment has elapsed, will make any difference in the construction of law.

The judgment of the Courts must be formed on the situation of the parties, at the period when the testator was compiling his will; and on the supposition that he had died at the period of the date of his will. It is by a reference to that period, that the intention of the testator must be collected.

The prominent circumstance by which the Courts are influenced to this construction, is the possibility that the person, to whom the lands are devised, might sustain a loss, if it were decided that he took any estate less than the fee.

The value of the land, or the probability of gain, (and though the probability gives every chance, short of an absolute certainty, in favor of the devisee,) will not vary the construction.

To entitle the devisee to the fee, under a general devise, leaving the intention to the construction of law, it will, in the contemplation of law left to its genuine construction, be sufficient, that there is the most remote possibility that the devisee may sustain a loss, should it be decided that he did not take a more ample estate than for his life.

In *Doe v. Fyldes (y)*, Lord Mansfield adverted to this rule of construction: he detailed and elucidated the principle; showing the grounds on which it prevailed.

After observing on those cases in which the Court had inferred a necessary implication of an estate in fee, from a devise of lands without any words of limitation, where the lands were charged with a gross sum, he added, "The doctrine, in those cases, began when the modification of uses was by way of condition; and charging the devisee with the payment of a

(y) Cowp. 833.

gross sum was looked upon as a *condition*, the non-performance of which amounted to a forfeiture of the estate. The direction was, to pay a sum of money, by way of condition, and the heir entered for the condition broken. Where the testator uses no words of limitation, there the rule of law in the case of grants and deeds, that without words of limitation it shall be for life, and for life only, takes place. But in the case of a will, the manifest intent of the testator is decisive, and need not be expressed in any formal words. The certainty that the testator must mean a bounty and benefit to his devisee, is sufficient to supply the want of a formal limitation.

Thus, it was observed by Ch. J. *Willes* (x), "If a man devise an estate to another, paying his debts, or paying a certain sum in gross, the devisee takes a fee-simple. It was, indeed, formerly, a doubt whether or not he took a fee-simple, unless the sum exceeded the annual sum; but it has long been settled, that such devise gives a man a fee-simple without any regard to the quantum of the debts, or of the sum devised to be paid, and the value of the lands."

And Lord *Kenyon* observed (a), "The question has always been, whether the charge is to be paid only out of the rents and profits of the estate; or whether it is to be paid by the devisee at all events? in the former case, the devisee only

(x) *Willes's Rep.* 140.

(a) 8 Term Rep. 2.

takes an estate for life, but in the latter he takes a fee; otherwise he might be a loser by the devise."

In those instances in which the sum charged is directed to be paid *out of the rents and profits* of the land (b) *generally*, or *when and as*, or *after* they are received, the person to whom the land is devised, is not, by any direction, under an obligation to advance any money beyond the amount of the rents which shall come to his hands. For this reason, he cannot, without his own voluntary act, receive any prejudice by the charge, or be affected by it, otherwise than by a diminution of the income of the estate as to his interest, or by postponing his right to the enjoyment till the sum charged shall be raised; and therefore there is not any ground to extend the intention of the testator beyond the words of the will, and the general interpretation of the law on these words, abstractedly from the charge; and accordingly the devisee will have a mere estate for life. Let it, however, be remembered, that if a tenant for life, or in tail, discharge an encumbrancer, he has a right to stand in the place of the creditor. This is a rule of equity and not of law (c).

The prominent distinction that the devisee shall have an estate in fee, without any words of limitation, when the devise is to him

(b) 8 East, 141.

(c) *Jones v. Morgan*, 1 Bro. C. C. 206; *Shrewsbury v. Shrewsbury*, 1 Ves. jun. 227.

generally, and he is treated by the testator as a person who is to be liable to the payment of a sum of money; and an estate for life only, when he is no otherwise answerable than in respect of the profits of the land, and he is not to pay the charge till he has received the means of doing it, was taken in *Colyer's* case (c), and to this time has remained the rule of construction.

In *Colyer's* case, a man had issue a daughter; and by his will, in writing, devised part of his land to his daughter, and other part to his wife, for life; that with the profits she should bring up his daughter, and that after her death, it should remain to his brother, paying to one, 20s., and to others, small sums, amounting to 40s. in all. The land was of the value of 3*l.* a year; and it was adjudged, that the brother was entitled to the fee-simple. And in this case the following diversity was taken, and the resolution was agreeable thereto, that if the devise had been to the brother, of the land, to the intent that with the profits he should educate his daughter; or, out of the profits of the land, pay to one so much, and to another so much, it would have given only an estate for life; for he would be sure to have no loss. So if the land be of the value of 3*l.* a year, and he devise, that the devisee shall

(c) Cro. Eliz. 378; S. C. *Colyer* and *Walker*, 6 Rep. 16; *Freak v. Lee*, 2 Lev. 249; Pollexf. 553; and see Cowp. 835, and *Bacon v. Hill*, as there cited; *North v. Brimpton*, 1 Ch. Ca. 196; Gilb. on Dev. 79; 4 East, 496.

pay for it 20*s.* or 30*s.* or 40*s.* or 50*s.* per annum to another, it is only an estate for life, for he may pay it out of the profits, and is sure to have no loss (*d*) ; but in the case at bar it was said, after payment, he may die before satisfaction, and therefore it is a fee-simple; and the law doth intend that the devise was for his benefit, and not for his prejudice.

And in *Webb and Herring* (*e*), a man devised lands in *London* to his son, in tail, remainder to his daughter for her life; and willed, that after the determination of these estates, *John* and *Robert Winterbury* should have these lands; and that they should pay 6*l.* 16*s.* yearly, to the Company of Merchant Taylors, to be disposed of for charitable uses: and upon the question, what estate *John* and *Robert* had, it was resolved that they had a fee-simple, by reason of the payment of money annually; and that no notice was to be taken of the yearly value of the land, beyond the sum which they were to pay: for any sum of money paid or payable, gives the devisee a fee-simple. But it must be noticed, that at the end of the devise there were the following words: "And if the said *J* and *R.* and their successors, do deny the said payment of 6*l.* 16*s.* it shall be lawful, &c." and these words were material, since they showed, that the successors of the devisees, meaning their heirs, were to be liable

(*d*) See *Doe v. Richards*, and *Doe v. Snelling*, *supra*.

(*e*) *Moor*, 852; *Cro. Jac.* 415; *Bridg.* 84.

to the charge ; and consequently were to have the estate upon which the charge was imposed.

And also in *Wellock and Hamond (f)*, which was prior in time to the case of *Webb and Herring*,) a copyholder in fee of land descendible in borough English, having three sons and one daughter, devised his land to his eldest son, *paying* to his daughter, and to every of his other sons, 40s. within two years next after his death ; and made a surrender, according to the custom of the manor, to the use of his will, and died : and it was held, that although the yearly profits of the lands, for two years, exceeded the money to be paid to his sons and daughter, the eldest son had a fee-simple ; for as it was said, the recompence and consideration, although it was not to the value of the land, did, in case of a will, make it, in construction, a fee-simple.

Again, in *Lee and Withers (g)*, the testator devised to his son *John* the land which he had purchased of *J S* ; and to *James*, his son, the lands which he had purchased of *J N*, and which were found to be of the value of 20*l.* a year ; conditionally that *James* should allow to *Nicholas*, another son of the testator, and for whom no other provision was made by the will, meat, drink, apparel, and convenient lodging during his life. *James*, during his life, performed the condition, and *Nicholas* survived

(f) Cited 3 Rep. 20 b ; Mich. 32 & 33 Eliz.

(g) T. Jones, 107.

him. On an ejectment, the question was, what estate was given by these several devises? And it was resolved, without any difficulty, that *John* had only an estate for his life; but as to the devise to *James*, it was objected that he also had only an estate for life, on the ground that the word "*allow*" implied that this should *be out of the profits*, which being of the value of 20*l.* a year, were sufficient for the purpose, and no charge or loss to the devisee. But, on that point, it was answered and resolved by the Court, that the fee was devised to *James*, for *Nicholas* might have maintenance immediately, which would be a charge to *James*, before any profits could be received; and the devise is not that he should allow out of the profits.

The circumstance of paying a sum of money or a legacy, is stated only for example (*h*). Suppose the devisee is by the terms of the devise to him, either,

- 1st, To release a debt; or,
- 2dly, To buy an estate for another; or,
- 3dly, To relinquish a right which he has or claims in some other land, or to give up any other benefit;

he will be equally entitled to an estate in fee.

An estate for life might determine before he could receive his money, or the value of his interest in the land. For this reason, the several

(*h*) 1 And. 35; *Bryan v. Baldwin*, Bendl. 15; *Gilbert on Devises*, 23.

cases are within a parity of reason, and require the like decision.

On the diversity taken in *Colyer's* case, the question under this rule is always, whether, by the will under consideration, the devisee is, in point of intention, charged *personally*; or not personally charged; but, in terms, or in construction, is charged only *for the profits* as they shall come to his hands.

A great variety of cases has involved this question (*i*); and the reader is advised to peruse these cases in the books in which they are reported at large. In the *margin* there is a reference to the leading cases. Every case must depend very materially on its own circumstances; for it is on the penning of each respective will, that the Judges must determine, whether the case falls within the one or the other branch of the distinction.

Nor, under this rule, will a fee arise to the devisee by construction, if an express estate in tail, for life, or for years, be limited to him.

In *Dutton v. Ingram* (*k*), the devise was to one son (*John*) and his heirs, on condition that he, as soon as the lands should come to him in possession, should grant to another son (*Stephen*) and his heirs, an annual rent of 4*l.* out of the said tenements, with a limitation over to *Stephen*, and the heirs of his body, if *John*

(*i*) *Dickins v. Marshal*, Cro. Eliz. 330; *Canning v. Canning*, Mosel. 240; *Doe v. Richards*, 3 Term Rep. 356; *Goodtitle v. Maddern*, 4 East, 496; *Doe v. Holmes*, 8 Term. Rep. 1.

(*k*) Cro. Jac. 427.

died without heirs of his body. And it was ruled, that *John* might grant a rent in fee-simple (being according to the form of the gift,) and yet it was admitted he was only tenant in tail.

A charge on the land, as distinguished from a charge on the person, would not entitle the devisee to the fee.

Hence the observation of Lord *Kenyon* (1) : “Supposing the deviser had, in the beginning of the will, charged his debts and funeral expenses on his real estate ; and had then, after a series of limitations, devised to his wife, in the words now used, *viz.* ‘after payment of my just debts and funeral expenses,’ it could not have been contended that such a charge on the real estate would have passed the fee to his wife ; and if not, the place in which the same words are introduced, cannot vary the question. I admit that the real estate *is charged* with the payment of debts and funeral expenses, if the personalty be insufficient for that purpose ; but there are no words charging the estate in the hands of the wife with the payment of those debts. This therefore essentially differs the present case from that of *Doe v. Richards* ; for there the debts were to be paid by the devisee, and were a charge on the estate in his hands ; whereas here the debts are no charge on the devisee.”

So if the charge of a sum of money, or of an annuity, be in a distinct clause, without any

(1) 5 Term Rep. 562.

direction, express or by construction, that the devisee is to be personally liable to pay the legacy or the charge (*m*), a gift of the fee would not be implied from this charge.

An inaccuracy sometimes occurs in expressing this distinction.

Every devisee, as owner, will be liable to pay the charges imposed on the land; and he, though personally charged, will not be liable to any greater extent than he has received rents and profits.

The implication of the fee does not arise from the mere charge, or from such liability to pay the charge. It arises when in terms, or by sound construction, there is a direction that he should pay, without restricting the payment to be out of the *rents and profits*: for from this direction, the law, which could not relieve the devisee after he had paid, though he died before repayment, would intend, from the charge, that the devisee was to have the fee.

Besides, at the period when the rule was originally adopted, gifts of this description were, as Lord *Mansfield* has shown, considered to be on condition; so that there was an obligation to pay, as the means of preserving the estate from the operation of the condition; while, in modern times, the doctrine of conditions is deemed inapplicable, and equity administers relief by enforcing the charge (*ma*).

(*m*) *Doe d. Briscoe v. Clarke and Wife*, 2 New Rep. 343.

(*ma*) 2 Lev. 249.

Also, if the gift be subordinate to the charge, as a prior encumbrance, without special direction concerning the devisee as the person by whom it is to be paid, the fee will not pass.

Thus, in *Dickins v. Marshal* (*n*), the devise was of all the devisor's lands and goods, after his debts and legacies paid :

In *Canning v. Canning* (*o*), the devise was of all the rest, residue, and remainder of the devisor's messuages, lands, tenements, or hereditaments, after his just debts, legacies, and funeral expenses shall be fully paid and satisfied :

And in *Denn d. Moor v. Mellor* (*p*), the devise was of the residue of, &c. after payment of debts, &c. ; and the fee did not pass (*q*) :

And in *Merson v. Blackmore* (*r*), the gift was of all his lands, &c. after debts and legacies are paid, and funeral expenses are discharged ; and was preceded by an introductory clause, intimating an intention to dispose of all worldly goods whatever. Lord *Ellenborough* observed (*s*), " the debts, &c. were not a charge on the executrix, residuary legatee, devisee, &c. because the devisee was to have the estate only after these charges were satisfied. And the decisions depend on the distinction (*t*), that where the devise is only after

(*n*) Cro. Eliz. 330.

(*o*) Moseley, 240.

(*p*) 5 Term Rep. 558 ; 2 Bos. & Pull. 247 ;

(*q*) See *Doe d. Jackson v. Ramsbotham*, 3 Mau. & Selw. 516.

(*r*) 2 Atk. 341.

(*s*) 4 East, 499.

(*t*) 4 East, 500.

payment of debts, there the charge is upon the land, and the devisee himself takes nothing till after that charge is satisfied: but where the devisee himself is charged with the payment of the debts, there he must take the fee in the estate in respect of which he is so charged."

Also, on a gift to *A* and *B*, except 20% to be paid out of *E*'s part of the lands, the devisees took for life only, "because this sum was not a charge upon the estate in the hands of the devisee, but a charge antecedent to the devise; not a devise upon condition of paying (*u*).

It must not however be forgotten (*x*), that the fee may pass by other words in the will, although the gift be after payment of debts, legacies, and funeral expenses (*y*).

The following observations of eminent Judges are added, as elucidating this class of cases:

In *Denn v. Mellor* (*z*), Lord *Kenyon* observed, "This case has been compared to that of *Doe v. Richards*; but," he added, "there the words were, 'my legacies and funeral expenses being *thereout* paid,' which imported that those sums were to be paid by the devisee, out of the interest given to her; and if she died immediately after the devisior, and had only taken a *life-estate*, the fund out of which

(*u*) *Roe v. Daw*, 3 *Mau. & Selw.* 518.

(*x*) See p. 114. 115.

(*y*) 8 *East*, 141.

(*z*) 5 *Term Rep.* 562.

she was to bear those charges might have failed; we were therefore compelled to make that decision, and I am perfectly satisfied with it (2a)."

And in *Goodtitle v. Maddern* (a), Lord *Ellenborough* observed, "She cannot have less than a fee in it; because she is empowered to sell it: which she cannot do without having the fee."

The language of the devise, in that case, is stated in a former page.

In *Doe v. Snelling* (b), the question, as Lord *Ellenborough* observed, was, "Whether *George Snelling* and his wife, the devisees, took the fee, or only an estate for life, in the lands and premises in *Bramley* and *Wonersh*." He added: "The testatrix, after giving several pecuniary legacies, first disposes of her messuages, &c. in the parish of *Wingrove*, which she devises to *George Snelling* alone; and that may probably be contended to pass only a life estate to him; if any question should arise upon it. Then she devises to *George Snelling* and his wife, the premises in *Bramley*; also the premises in *Wonersh*. Those two estates, it is to be observed, are disposed of in the same continuing and entire sentence; for the words, 'I give and bequeath,' are not repeated, and must necessarily, therefore, extend to the subsequent part of the sen-

(2a) See *infra*, p. 250.

(a) 4 East, 499-

(b) 5 East, 91.

tence, in order to make it intelligible. The sentence then goes on: 'Also all and singular my goods, chattels, &c. and personal estate, of what nature and kind soever, as I shall die seised and possessed of,' &c. Here again the continuity of the sentence is evinced; for having first devised the realty and then the personalty, the word *seised* appears to have been used as applicable to the realty, and *possessed* as applicable to the personalty. And then the sentence, after disposing of both species of property, concludes thus: 'After having thereout first paid and discharged all my just debts and funeral expenses; also subject to the payment thereout,' repeating again the word thereout, 'all the aforesaid legacies.' The question then is, whether the fee be not given, by necessary implication, from these concluding words, which impose a charge upon the devisees of the payment of debts, legacies, and funeral expenses, which a less quantum of estate might not be sufficient to satisfy. I take the rule to have been laid down by Lord *Kenyon*, in *Doe v. Mellor*, and *Doe v. Holmes*. The question has always been, whether the charge is to be paid only out of the rents and profits of the estate, or whether it is to be paid by the devisee, at all events? Where debts or annuities are to be paid by the devisee, at all events, out of the estate in his hands, the devisee must take a fee; otherwise the charge might be greater

than the estate devised, and he would be a loser. For if he only took an estate for life, the debts, &c. might be payable before the rents became due, and he might not live long enough to reimburse himself. But where the charge is only payable out of the rents and profits, there the devisee cannot be a loser, as he cannot be chargeable with more than he has received. The distinction, therefore, turns on this; whether the charge be on the *person* of the devisee, or only on the property devised. Now here the estate is devised to the devisees, with a direction thereout to pay debts and funeral expenses. That brings the question to the grammatical construction of the sentence 'after having thereout first paid and discharged all my just debts and funeral expenses; also subject to the payment thereout of all the aforesaid legacies.' The payment thereout is to be made by the devisees; and the word 'thereout,' means out of the property before given to the devisees. What then was the property before given? All, at least, which was before included in the same sentence. And in order to make it sense, we must read it as one entire sentence, beginning at the words, 'also I give and bequeath unto the said *George Snelling*, and *Sarah* his wife,' &c.; for the words, 'I give and bequeath,' occur only once. If then the sentence include the real, as well as personal property, and the debts are

to be thereout paid *by the devisees*, it differs this from the case of *Doe v. Mellor (c)*, and that class of cases where the land is devised only after payment of debts; for there the thing itself is not given to the devisee, till after those charges have been first satisfied. But where the devisee is to *pay the charge out of the land*, he must first take the interest in the land. This brings the case within that of *Doe v. Richards (d)*, the doctrine and principle of which are right, though perhaps the words to which it was applied *will hardly sustain the application*, as was considered by many of the Judges on the decision of the case of *Moor v. Mellor (e)*, in the House of Lords. That was a devise of lands, 'his legacies and funeral expenses being *thereout paid*;' and those words were holden to carry the fee, being considered the same as if the deviser had said, 'being *by him* (the devisee) thereout paid.' And if those words had been added, the application of the doctrine would unquestionably have been right. The doctrine, however, has been long established. In *Merson v. Blackmore*, the Master of the Rolls says, that 'where a gross sum is to be paid out of the lands, to be sure it gives a fee to the devisee of those lands.' In *Doe v. Holmes (f)*, the deviser gave

(c) 5 Term Rep. 558; 1 Bos. & Pull. 257.

(d) 3 Term Rep. 356.

(e) 1 Bos. and Pull. 253.

(f) 3 Term Rep. 1.

his house and furniture to one whom he made executrix, 'she paying all his debts and legacies.' Lord *Kenyon* said, that the devisee was bound to pay the debts and legacies at all events, and the charge was thrown on her in respect of the real estate. The sentence here is not framed as in *Hopewell v. Ackland* (g) : there, each sentence beginning, 'Item, I devise,' &c. was complete and distinct in itself ; and the words, 'he paying my debts and legacies,' included under the last item, was more disjointed from the preceding items than in this case, where it is all coupled together with the devise of the realty, in one sentence. Then the only remaining question is, whether the subsequent appointment of *George Snelling* to be sole executor, and charging him with the payment of all the debts, legacies, and funeral expenses, can make any difference, the devise of the land having been before made to him and his wife with the same charges upon them ? I cannot consider these words as importing that he should do more than the law would have required of him if the words had not been added. And upon the whole, I am clear that the debts, &c. were *personal charges* upon the devisees in respect of the property devised to them, and that they must take an estate commensurate with the charges, which they cannot be certainly ascertained of, without taking a fee in the lands."

5thly, That the estate of the devisee is not to determine merely and simply on his death, but on an event connected with his death, and leading to the conclusion, that he is not to have an estate for life only (*h*).

Under this rule, the fee passes by implication; and examples of fees by implication, under other circumstances, will be added.

The rule may be enlarged in expression, and it may be stated in these terms: a fee may pass by mere implication: in other words, *a person may have an estate in fee by mere implication*. Thus, a man devised to *A*, and if he should *die under age*, to the heirs of himself, the testator (*i*); and it was held, that the devisee took an estate in fee. If the testator had intended the estate of *A* to determine by his death, no reason existed for any provision against his death under age. By marking that event, as the contingency on which the estate should revert to his heirs, or be enjoyed by any other person, it necessarily must be understood that he intended that his heir, or the substitute, should not have the land in any other event; and of consequence, that the devisee should have an estate in fee, subject only to that restriction. For the devise must have been construed to pass, either an estate for life only, or in fee; and to have decided that the will passed.

(*h*) P. 72.

(*i*) *Fowler v. Blackwell*, Com. Rep. 353; 8 Vin. 262. pl. 17. S. C.

an estate for life only, would have admitted that the provision for the death of the devisee under age was nugatory and merely void ; since, from the nature of an estate for life, the provision would not have been to any purpose, as that estate necessarily would have determined with the death of the devisee, whether he lived to attain the age of twenty-one years, or died under that age.

And although the person who is to take, in the event from which the *inference* of a *fee* arises, is not the testator's heir at law ; yet the devise will, under the same circumstances, give an estate in fee.

It is from the words of the will, collectively considered, that the Courts perceive that the devisee cannot take any other estate than a *fee*, consistently with the intention of the testator, discoverable from these words.

Thus, in *Frogmorton* lessee of *Brampston* and *Holyday* (*k*), the testator, as to all her worldly affairs and estate, disposed thus : "To her son *David*, and his heirs for ever, her malt-kiln, of the value of 10*l.* *per annum* ; to her daughter *Elizabeth Locking*, her house and garden in the Ropery ; and after her decease to her two sons, *John* and *David Locking*, share and share alike ; to her son *John Haslewood*, a house and garden, charged with the payment of 50*l.* out of the yearly rents and profits, till the same should be

(*k*) Black. Rep. 535 ; 3 Burr. 1623.

discharged, for the benefit of her daughter *Margaret Holyday*; and if said *John Haslewood* should die in his minority, then the said house and gardens to the testatrix's daughters, *Elizabeth Locking*, *Margaret Holyday*, and *Hannah Haslewood*, equally, share and share alike: to her daughter *Hannah*, and her heirs for ever, another house and garden."

And Lord *Mansfield* made these observations: "The limitation over, in case *John* died before twenty-one, to his sisters, shows she meant the heir should not have it. Where an estate is directed to be taken away from an institute, on a contingency, which does not happen, it shall not be taken away in any other circumstance; and so *vice versa*, where it is to be taken away upon the not happening of a contingency, the substitute shall not take it on any other circumstance."

Wilmot J., accorded; and added, "This is a kind of loose evidence, and must be twisted together. The reason of using the word heirs in the other devises, and of omitting it here, might possibly be this: the will-drawer might think the substitution could not have taken place, if the first devise had been to *John* and his heirs. But the only event in contemplation of the testatrix, upon which she intended to take away the benefit she had given, was, in my opinion, the death of her son before the age of twenty-one."

And, according to *Barrow's Report*, Lord

Mansfield added those observations which will be found in the criticism introduced by Lord *Ellenborough* in the case of *Doe v. Cundall* (1).

To elucidate this case, as well as the case last mentioned, it will be material to observe, that under the words of the will, the devisee must necessarily have taken an estate for life or in fee. That he was not to have a mere estate *for life*, was considered to be clear, from the reference which the testator made to his death, under age. The argument also arose in this case, as well as the case last cited, that if the testator intended that the estate of the devisee should determine with his death, it was not to any purpose to have provided for his death, under age, as the event on which the subsequent estate was to take effect in possession. In the case now under consideration, a distinction was urged between a devise over to the *heir at law*, and one to a *stranger*. That argument was disregarded. The Court avowedly decided the case on the ground, that on the face of the whole will, the estate of the first devisee was to determine only in the event of his death under age; and that it must, for that reason, have been the intention of the testator, that the first devisee should have the fee.

The determination of the Court of King's Bench, on a case in that Court, *viz.* *Doe* on the demise of *Davy v. Burnell* (m), is still

(1) *Infra*.

(m) 6 Term Rep. 30; see 9 East, 400; *Crump v. Norwood*, 7 Taunt. 362. S. P.

more decisive on the point. In that case, the testator, who was seised in fee of the premises in question, and possessed of several leasehold estates, devised all his freehold and leasehold estates, and all other his estates whatsoever, both real and personal, subject and charged respectively with certain annuities therein mentioned, and a life-estate to his wife, in a certain part thereof, (after payment and discharge of all his debts, legacies, and funeral and testamentary charges and expenses in and about executing his will,) unto his niece *Mary Ostwick*, otherwise *Ellard*, and *the issue of her body* lawfully to be begotten, as tenants in common (if more than one); but in *default of such issue*, or, being such, if they *should all die under the age of twenty-one years, and without leaving lawful issue* of any of their bodies, then he devised the same to other persons."

Lord *Kenyon* said, he agreed that the limitation to *Mary Ostwick* was for life only, and that the limitation to her children was to them as purchasers; and that it certainly was sufficient to carry to them some quantity of estate: that if the plaintiff's counsel had succeeded in proving that there was nothing to be collected from the will, to show that the children were only to take for life, then, according to the case of *Roe v. Grew* (*n*), the Court would have endeavoured to convert the estate of *Mary Ostwick* into an estate-tail, in order to effectuate

(*n*) 2 Wils. 322.

the intention of the devisor : that it had been argued, the words in the will were only sufficient to give an estate-tail to her children ; but that he thought there was enough in the will to carry a fee to them : that there were the prefatory words, ‘ all his *freehold* and *leasehold estates*,’ which would carry the fee, if it appeared to be the intention of the devisor that they should have that effect : that the word ‘ estates’ also, would, *ex vi termini*, carry a fee. He added, that in order to discover the testator’s intention, consider what was his situation when he made his will ; he had a niece who would probably become the mother of children, and he gave an estate for life to that niece, and then an estate to the children which that niece might have : that if the will had stopped there, the children would have taken a fee ; but the testator then gave the estate over ; ‘ but in default of such issue, or if they should all die under twenty-one, *and* without leaving issue,’ &c. There is no doubt, indeed, but that a word of conjunction in a will has been construed in the disjunctive, and *vice versa*, a disjunctive construed in the conjunctive, where it has been necessary to give effect to the devisor’s intention ; but unless there be something in the will, from which it is to be collected that the devisor did not use such words in the grammatical sense, the grammatical construction must prevail. In the present case, the word used is a conjunctive word, *and* ; now

by construing that word in its proper sense, we shall give effect to his intension. The deviser seems to have reasoned thus ; " If the children of my niece live to attain the age of twenty-one, when they will be qualified to dispose of this property prudently, I give it to them in fee ; if they happen to die under twenty-one, and without leaving issue, then I will consider to whom I can best dispose of the estate ; and in such an event I will it to my collateral relations."

Dec d. Wight v. Cundall (o), is a leading authority.

The testator devised thus : " *Item*, I give and bequeath unto the two children, *Elizabeth* and *Jemima*, daughters of my brother *William Wight*, deceased, the first four freehold houses next my dwelling house, built by me in 1770, when they have attained the age of twenty-one years. But the executor and executrix shall be accountable for the profits of the said houses unto the said children, until the aforesaid age of twenty-one years, or the day of marriage ; but if either of them should die before the said age of twenty-one years, then the survivor shall be *heir* to the other two houses. Likewise, I give and bequeath unto the two children, *Robert* and *Rebecca*, son and daughter of my late brother *Robert*, deceased, the next four houses adjoining to the same, *on the same conditions* as my brother *William Wight's* children."

(o) 9 East, 400.

The judgment of the Court of King's Bench was delivered by Lord *Ellenborough*, Ch. J.

He observed, "Admitting that the word heir, as here used, is merely a word of substitution, (an admission which I would not be bound by generally,) still there is enough in the will to indicate an intention in the devisor, by the devise to his brother *Robert's* children, on the same conditions as his brother *William's* children, (by which must be understood, that he devised the premises to *Robert's* children, in the same terms as the preceding devise,) namely, when they attained the age of twenty-one years; and the executors to be accountable to them for the profits in the mean time: and that if either of them died before twenty-one, the survivor should be heir to the party so dying; that the party so dying should have a fee, which should go over to the survivor in that event, or should vest absolutely in the party attaining twenty-one. Here then *Robert*, the nephew, having attained twenty-one, on his death, the premises descended to his sister, *Rebecca*, his heir at law. What is said at the conclusion of the case of *Purefoy v. Rogers*, as far as the opinion of a very learned man goes, is in support of this construction. But it does not rest on that; for the subject was very fully and distinctly discussed in *Frogmorton d. Bramstone v. Holyday* (p), where Lord *Mansfield*, commenting on similar words, after a devise of

(p) 3 Burr. 1688.

premises generally to *J H*, the devisor's son, charged with the payment of 50*l.* out of the yearly rents; and if *J. H.* shall die in his minority, then over to her three daughters, says, 'that those words, 'if he should die under twenty-one,' showed her intention to give a fee; for if he lived to twenty-one, he might then dispose of it himself; if he died before, he could not, and then she disposed of it. If *J H* was barely to take an estate for life, the time of his death must be immaterial to the devise over: but limiting it over only upon the contingency of his dying in his minority, shows that she intended to give him an absolute estate in fee, which he might dispose of, if he came of age; and unless he lived to be of age, (when he might dispose of it,) she meant it should go to her daughters.' The whole doctrine and effect of these words were there so fully stated, that it is unnecessary to add any further authority. But Lord *Mansfield*, in another case (*q*), mentions a case of *Tomkins v. Tomkins*, in Chanc. Hil. 17 Geo. 2, where the devise was to his brother, in trust for his eldest son, *B*, till he should attain twenty-one; and if he should die before twenty-one, then a devise over.' The Court held the age of twenty-one to be no limitation of *B*'s interest; but only a limitation of the trust during his minority; and that *B* took the whole by implication. There are other authorities which

(*q*) *Goodtitle v. Whitby*, 1 Burr. 234.

might be cited, that a giving over, on a dying before twenty-one, shows an intention, that if the party attain twenty-one, he should have a fee absolute."

So in *Merest and Wife against — James, Esq. (r)*, the testator devised to his daughter, *Eunice Anna*, for her natural life; and from and after her decease, to the issue of her body, lawfully begotten; and in default of issue, or in case none of such issue live to attain the age of twenty-one years, to other persons. And the Court of Common Pleas (*s*) certified to the Court of Chancery, that the said *Eunice Anna* took the beneficial interest for her life only.

It follows, that the issue were to be purchasers; and being purchasers, they would have the fee by implication.

It had been supposed by the devisees, that the word issue was a word of limitation, and gave *Eunice Anna*, the parent, an estate-tail. The certificate negated that construction.

In *Toovey v. Bassett (t)*, the devise was to grandchildren, as tenants in common; but in case of the death of either of them, under age, and without leaving any issue, the share of the person so dying to go to the survivor; and it was certified to the Court of Chancery, by the Judges of the Court of King's Bench, "that the nine grandchildren of the testatrix took, under

(r) MSS. C. B.

(s) Feb. 18, 1820.

(t) 10 East, 460.

her said will, estates in fee, as tenants in common, in the said freehold premises, and an absolute interest, as tenants in common, in the said leasehold premises, with executory devises over, if any of them die under twenty-one, and without leaving lawful issue at the time of their respective deaths."

The same doctrine is supported by *Moore d. Fagge v. Heaseman* (u). The gift was in this language: "To my sister, Dame *Mary Fagge*, during her natural life, and, after her decease, to her daughter *Susannah Fagge*, paying to each of her sisters, *Elizabeth* and *Mary Fagge*, 500*l*, apiece of good and lawful money of England; and if either of them die, the survivor of them to have the legacy. And if the said *Susannah Fagge* die, I will that the farm be divided between the survivors; and in case all three daughters die before their mother, I will it descend to the right heirs of Dame *Mary Fagge*, my sister, for ever."

And in the opinion of the Court, delivered by Lord Ch. J. *Willes*, on this case, the following observations are found: "Taking it therefore for granted that *Susannah* took an estate in fee, the next question is, what estate her sisters *Elizabeth* and *Mary* took, on her dying before the payment of their legacies? And if the words of the will had gone no farther, than, that in that case, the farm should be divided between them, yet we should have thought

(u) *Willes*, 138.

that they would have taken a fee ; for it is plain that the testatrix intended that they should have *the same interest in it as Susannah* ; and it is given to them *in lieu of their legacies*, which they might have disposed of as they pleased ; and therefore it is highly reasonable that they should have the same power over the estate.

“ But if there were any doubt on these words, we think that the subsequent words, ‘ *in case all three daughters die before their mother*, that it shall descend to the heirs of the mother,’ have put it beyond all dispute, and plainly show the intent of the testatrix. For if she intended that the daughters should be only tenants for life, and consequently that it should go to the heirs of the mother, *whether the daughters died before their mother or not*, it would have been most absurd in her to say, that it should go to the heirs of the mother, in case the daughters die before her. Unless, therefore, these words are rejected, (which to be sure they cannot,) they plainly exclude any such construction, that the testatrix intended them only an estate for life ; even though they outlived their mother. And this is exactly agreeable to what is said by *Saunders*, at the end of the case of *Purefoy v. Rogers* (x). It is not, indeed, the point, as adjudged there ; but *Saunders* was a very great man, and his reasoning, in that case, is, I think, unanswerable. The words there were, ‘ A man gives the

(x) 2 Saund. 388.

inheritance of his lands to his wife, for life ; and then to her son, after his mother's life ; and if he die before he comes to the age of twenty-one years, then he gave the inheritance of his lands, after his wife's life, to his own heirs for ever.' The words are exactly parallel to the present ; and *Saunders* argued, that by the words, ' if he die before twenty-one, then the estate should go to his own heirs,' he must mean that ' if he lived to be twenty-one, it should not go to his own heirs,' but that the son should have an estate in fee. It was said, indeed, in the present case, that the word ' inheritance' was in that devise, which *vi termini*, carries a fee : but *Saunders* did not take notice of this ; and it is plain no argument could be drawn from it, because (y) the testator used the very same word when he gave the estate to his wife only for her life."

Also in *Marshall v. Hill* (z), the testator gave " to his wife *Margaret*, without impeachment of waste, during her natural life ; and from and after her decease he gave the same, (except as thereafter excepted,) together with the reversion or reversions of all other lands in *Bradney*, which should come to him and his heirs, upon the decease of his wife, to his brother-in-law, *Thomas Marshall*, his heirs and assigns, to the use of his brother, *J. Congreve*, for and during his natural life ; and from and after his decease, to his first second, third,

(y) *Sed quære.*

(z) 2 Mau. & Selw. 608.

fourth, fifth, or sixth son or sons, lawfully begotten, according to their seniority of age, or priority of birth; and in case of no such son or sons arriving at the age of twenty-one years, then he gave the same to the use of *John Marshall*, the eldest son of the said *T. Marshall*, during his natural life, and after his decease, to his first, second, third, fourth, fifth, or sixth son or sons, in the manner as was before expressed; and in case no such son or sons lawfully begotten, should arrive at the age of twenty-one years, then he gave the same to the use of *James Marshall*, the second son of the said *T. Marshall*, and his son or sons lawfully begotten, in the manner aforesaid; and, last of all, if the said *James Marshall* should die without issue to inherit as aforesaid, then he gave the same to the use of his niece *Ann Marshall*, her heirs and assigns for ever."

And after charging his freehold lands in the manor of *Wyken* with the payment of certain sums of money, and giving certain pecuniary legacies and an annuity, and charging all his freehold lands in the parish of *Stotesden* with the payment of his debts, legacies, and annuity, in case his personalty should fall short, the testator devised as follows: "*Item*, I leave the same, subject to my debts, legacies, and annuity as aforesaid, together with the manor of *Delton*, and all other estates in the parish of *Neen Savage*, subject to my wife's jointure

and aunt's annuity, to my brother *Thomas Marshall*, to the use of my brother, *J. Congreve*, during his natural life; and from and after his decease, to his first, second, third, fourth, fifth, or sixth son or sons, lawfully begotten, according to their seniority of age, and priority of birth; and if my brother, *J. Congreve*, should die without such issue as aforesaid, and before they arrive at the age of twenty-one years, then to the use of *John Marshall*, the eldest son of the said *T. Marshall*, and his son or sons, limited as aforesaid; and if the said *John Marshall* should die, leaving no son or sons as aforesaid, then to the use of *James Marshall*, the second son of the said *T. Marshall*, and to the use of the son or sons of the said *James Marshall*, lawfully begotten, and limited as aforesaid; and if the said *James Marshall* shall die leaving no son or sons, in the manner aforesaid, then I leave all and every part of the aforesaid estates in the parishes of *Stotesden* and *Neen Savage*, to the use of my niece, *Anne Marshall*, her heirs and assigns for ever."

Lord *Ellenborough*, Ch. J. observed, that the meaning of *leaving*, in this devise, seemed to be *having had*; and not leaving, in its ordinary sense; and *Bailey*, J. added, that the language of the Court on this point, in *Moone v. Heuseman*, was extremely strong; for *Willes*, Ch. J. said, "That if there were any doubt on the words which charged the devisee with the pay-

ment of a gross sum, the subsequent words, 'in case all the three daughters die before their mother, that it shall descend to the heirs of the mother,' had put it beyond all dispute, and plainly showed the intention of the testatrix; for, if she intended that the daughters should be only tenants for life, and consequently, that it should go to the heirs of the mother, whether the daughters died before their mother or not, it would have been most absurd in her to say, that it should go to the heirs of the mother, in case the daughters die before her. And that was exactly agreeable to what was said by *Saunders* in *Purefoy v. Rogers*, of which he approved." And *Bailey, J.* further observed, "That in *Moone v. Heaseman*, the limitation over was not to the right heirs of the devisor, but of his sister." And the Court of King's Bench certified, that in the events which had happened, (namely, the death of *John Congreve*, without having had any issue,) *John Marshall* took an estate for life, and *William Congreve Marshall* (only son of *John*,) a vested indefeasible remainder in fee in the premises.

And in *Statham v. Bell* and others (a), *Statham* having an only child, a daughter, made his will, reciting, "That whereas his wife, *Mary Statham*, was then pregnant, he devised his estate to his son, if his wife should be delivered of a son, when he should attain the age of twenty-one; if she should have a daughter, then

(a) In a note to 1 Doug. Rep. 66.

he devised one moiety of his estate to his wife, and the other moiety to his daughters, when they should attain their age of twenty-one years. And if either of them should die before that time, then her share to the survivor; and if both should die under twenty-one, *then the other moiety to go to the wife.* The testator died without having any child, after making the will, his wife not having been ensient; and the daughter died before she was twenty-one. On a case from the Court of Chancery, for the opinion of the Judges of the Court of King's Bench, the question was, whether the plaintiff, the testator's heir at law, or the widow who married *Bell*, the defendant, should have the estate, in the event which had happened? The certificate was in the following terms: "Having heard counsel, and taken the case into consideration, we think it was the plain intention of the testator, that in case no son should be born, and he should have no daughter, who should live to attain the age of twenty-one years, his wife should have the *whole estate*; therefore, in the event which has happened, we think *Mary Bell* took an estate in fee-simple, in the whole of the premises in question." The probable ground of this certificate was, that the Court considered the *wife as substituted in the place of the heir*; and therefore implied an intention, that she should take an estate of the same extent as the heir would have taken. And according to more modern

decisions, the fee might have passed by force of the word *estate*.

There are other cases which turned, in part, on the implication of a gift of the fee, from the general language of the will, although in the clause of gift, the estate was not extended to the *heirs*.

In *Shailard v. Baker and Wife (b)*, the testator devised lands to *James* and *Francis*, his two sons; and if either of them, or their *HEIRS*, do sell the same, the gift of it shall stand void, and so return to the *whole heirs* again. And in another part of the will, he willed that *James* and *Francis*, his sons, should pay annually to *William*, his eldest son, and his heirs, three pounds. And it was resolved, that this was an estate in fee, although there was not, in terms, a gift extending the estate to the heirs; for it appeared that the intent of the devisor was, that the *heirs* of the devisee should have it by the words, if he or his *heirs* alien; also, by the words, reserving rent of three pounds to his eldest son and his *heirs*. It is observable, that by naming the heirs in the clause restrictive of the power of alienation, the testator showed an intention that the fee should pass, since, without an intention to limit the fee, the heirs would have no power of alienation. It followed as a clear and necessary consequence; that the devisees were to have such an estate as, without the restriction, would authorize an alienation by their heirs; and the

(b) Cro. Eliz. 744; Com. Dig. Devise, N. 4.

heirs, being within the scope of the devise, it was a necessary implication that the devisee was to have the fee.

This case, indeed, might, with propriety, have also been decided on the ground, that the charge of the annuity raised the implication of a fee.

The case of *Chorlton v. Taylor (c)*, decided by Sir *William Grant*, is referrible to the same principle, and accounted for on the same reasoning.

The words which directed the surplus monies, in the event of sale, to be paid to the object of the testator's bounty, or his heirs, may be considered as the prominent feature in this will; having afforded to the Master of the Rolls occasion for the observation, "Why should he mention his [*James's*] heirs, unless he conceived he had given the estate to *James* and his heirs."

From the same case, it may be inferred, that a fee may be implied, because, in one event, the devisee is to have money as the produce of the land, while, in another event, the devisee is to have the land under a gift to him, simply without any words of limitation.

Also, in *Casterton v. Sutherland (d)*, the testator devised all his freehold lands, &c. in *Chelsea*, or elsewhere, to his wife *Lucy*, for her life; and from and after her decease, to his children, in the following manner: "Unto and amongst all and every our children, in such manner, and in such proportions, as my said

(c) 3 Ves. & Bea. 160.

(d) 9 Ves. 445.

wife shall, either in her life-time, or by her last will and testament, direct and appoint." He empowered his wife to sell the estates, and to lay out the money, and receive the interest for her life; and after her decease, he directed and appointed the same, *both principal* and interest, to be paid and applied "to and among our children, in such proportions as aforesaid;" and it was decided, that the children had the fee. The Master of the Rolls, Sir *William Grant*, observing, "That though in the devise of the lands, in the first part of the will, there were no words of inheritance, yet, in the subsequent part, the testator, giving his wife power to sell the estate, and appointing the money, both principal and interest, among the children, as the testator could not be supposed to intend to give them a larger interest in that part than in the former, they took several estates of inheritance.

So a fee may, without any words of limitation, pass to a devisee, because there is a gift to the heir, in one event only; thus, affording the inference, that this is the only event in which he is to take.

Robinson v. Grey (e), is an authority for the like conclusion, although the limitation over was to three trustees, for three daughters, for their lives; and after the decease of the survivor, then to all and every the child and children, as well sons and daughters of the said three

(e) 9 East, 1.

daughters, living at the death of the survivor of the daughters, and as tenants in common, with a limitation over; if all his daughters should happen to die without leaving any issue, then to *W. Robinson*, (who was the heir at law,) his heirs and assigns for ever; for the devise, which limits the estate to the testator's heir, in one event, raises the implication, that the devisee is to have the fee in every other event (*f*). *Moone* ex dem. *Fagge* v. *Heaseman*, supports this conclusion; but, as in all other like cases, the devisee must be in a condition, from the context of the gift, to take the fee by a favorable interpretation of the will.

So by a context, the devisee may be excluded from the fee; and the title of the heir to the fee be preserved.

Halliday v. *Hudson* (*g*), affords an example and illustration of this proposition.

The implication of a fee has, in some cases, been aided by the consideration, that the real estate was given, together with, and inclusive of, the personal estate; and that the absolute property of the personal estate would pass (*h*).

Sometimes it has been said in argument, and even in judgment, that a fee would pass, because the gift was preceded by an estate-tail; but that proposition cannot, as a general one, be maintained.

(*f*) Willes's Rep. 138.

(*h*) Page 132.

(*g*) 3 Ves. 210; *supra*, 115.

If it could have prevailed, it ought to have been adopted in *Roe dem. Peter and Wife v. Daw* (i); and in *Roe d. Callon v. Bolton* (k). *Cole v. Rawlinson* already cited, (being the case which suggests the argument,) is dependent on its peculiar circumstances.

In *Cole v. Rawlinson* (l), the *Bell Tavern* was settled upon *A* for life, remainder to *B* in tail, remainder to *A* in fee; and *A* devised all her right in the house called the *Bell Tavern* to *B*, without any limitation of estate; and it being at first doubted, on the construction of the will, whether the words all her right, &c. were connected with the devise of the *Bell Tavern*, and whether all the words were a continued branch of the same sentence; it was held by three Judges against *Holt*, that the fee passed to *B*.

One of the grounds on which the Judges decided in favor of this devise, as sufficiently extensive to pass the fee, was, that the intention of the devisor (who was the owner of the fee under the same deed by which the intail in favor of the devisee was created,) appeared plainly to be to devise a fee, because she knew that the devisee was tenant in tail before by the settlement; and that this fact must make this construction; otherwise the devise would be

(i) 2 Bl. Rep. 1045.

(k) 3 Mau. & Selw. 518.

(l) 8 Vin. Abr. 209, Devise, L. 2, pl. 29; 2 Ld. Raym. 832; Tr. of Eq. 59, § 2; 1 Bro. Parl. Cas. 108.

void, because the devisee had an estate-tail before; and therefore, a devise to him for life would be void.

On this devise, it must be observed, that it was necessary to impose one of two constructions; either that the devisee took an estate for life, or an estate in fee. To have given him an estate for life would not, in the opinion of the majority of the Judges, have answered any purpose. He was already the owner of the land for an estate-tail, and consequently of an estate which comprised the period of an estate for life: and since the testator must have intended to have given him something which would be beneficial; and to have given him an estate for life, would have been merely *actum agere*, it was contended, that there was, or at least in a case thus circumstanced, it might be reasonable to imply, an intention in the testator to give to the devisee the fee, as the only estate which would be of any value to him.

This case, if still an authority, must be treated as governed by its particular circumstances, and not by any *broad* principle; or by the mere circumstance, that the devisee was to take after a remote estate previously existing. For it is not to be inferred, that there is an intention to give the fee, merely because the land is devised to one person, after the death of another person generally; or, after his death without issue. No general rule warrants any such implication.

In *Roe* on the demise of *Callon v. Bolton* (m), the testator devised all his real and personal estate to his wife *for her natural life*, and *at or immediately after her decease*, he gave to his son *Paul*, all that his land lying and being in *Dudley*, without mentioning for what estate. He also willed, that all his grandchildren that are living twelve months after his wife's decease should have five shillings each of them, as a token of his love to generation. Some of these grandchildren were his heirs at law; and on the question, whether *Paul* took an estate for life, under this will, or an estate in fee, *De Grey Ch. J.*, *Blackstone*, and *Nares*, (in the absence of Mr. Justice *Gould*,) were clearly of opinion, that as there was nothing to prove the intention of the testator, to give more, or a larger estate, than the legal import of the words convey, excepting the trifling legacy of five shillings to his heirs at law, in common with the rest of his grandchildren, for the whimsical reason he has assigned, and not as a provision for the heirs; and even this depending on the contingency of their surviving their grandmother a twelvemonth, this will not be sufficient to exempt it from the general rule of law, which declares, that a gift to a man of lands, without expressing for what estate, vests only an estate for life.

So in *Roe* dem. *Peter and Wife v. Daw* (n),

(m) 1 Bl. Rep. 1045.

(n) 3 Mau. & Selw. 518.

the devise was of "all my lands in *T*, to *A B*, during her natural life; and after her death, to *T B*, his heirs and assigns; and for want of heirs begotten by *T B*, to *M B* and *E B*, except 20*l.* to be paid out of *E*'s part of the lands to *M B*." And it was decided, that *M B* and *E B* took only for life.

Also a fee may pass by a devise of land, in substitution for a legacy; especially with the aid of other circumstances (*o*).

Other cases, of fees by implication, are *peculiar to trust estates*.

They arise from devises of the legal estate, to one person in fee, in trust for another person generally.

The cases belonging to this head have a tendency to show, that when there is not any apparent intention to the contrary, the devise of the legal estate to one person in fee, in trust for another person generally, and without any words of limitation, will entitle the *cestui que trust* to the benefit of the fee.

Hence the *sixth* general rule. When the legal estate is devised in fee, and there is a presumable intention, that all the beneficial interest of that estate should belong to a particular person, or to a class or description of persons, although in the devise to them of the trust or beneficial ownership, there are not any words of limitation, the fee of the trust will pass.

(*o*) *Moore v. Heaseman*, Willes's Rep. 140. See Addenda, 288.

In *Bateman v. Roach* (p), the testator was seised in fee, and devised his lands to trustees, and their heirs, in trust for his nephew, *John Hatheway*, and for his niece, *Sarah Bateman*, for their lives; remainder to the children of the said *John*, and to the children of the said *Sarah* by her then husband, *Bateman*, in trust that they should have and receive the profits thereof, when they came of age. And the Court of Chancery was of opinion that these children took an estate in fee, as tenants in common.

So in *Reade v. Reade* (q), *Peter Rooke*, after a devise to his wife for life, gave to *George Reade* all his said estate, with the woods, &c. to hold to him, his heirs, &c. for ever, on trust to sell, give, devise, or otherwise dispose of all the said premises, with the appurtenances, unto and among his (*George Reade's*) four children by his wife, the testator's sister, *Barbara*, deceased, in such manner, and by such shares, and under such directions as *George Reade* should by deed or will appoint. And it was treated as quite clear, that the children had the fee, subject to a power of distribution.

And in *Peat v. Powell* (r), the testator devised all the rest, residue, and remainder of his real and personal estates, goods, and chattels to *Leake* and *How*, in trust for his younger

(p) 9 Mod. 104.

(q) 5 Ves. 744.

(r) Ambl. 387.

son, *Giles*, till he attained twenty-one, and then *the trust to cease*. And by *Henley*, Lord Keeper, *Giles* was intended to have the whole beneficial interest in the residue of the real and personal estate; and the trust was to continue only during the minority; and it was the same as if the testator had said, "I give the estate to trustees, in trust for *Giles*, till he attain twenty-one, and then to *Giles* and his heirs.

And in *Newland v. Shephard* (*s*), Mr. *Shephard*, the testator, devised the residue of his real and personal estate to trustees, their heirs, executors, and administrators, in trust to pay and apply the produce and interest thereof for the maintenance and benefit of such of his grandchildren, by his daughter *Newland*, as should be living *at the time of his* decease, until his said grandchildren *should come to the age of twenty-one years*, or be married; and he went no further, nor made any other disposition of his estate, only directing, that if all his trustees should die, his son-in-law, *Newland*, should be a trustee. And by Lord Chan. *Macclesfield*, "The intention is most plain, that the grandchildren should take the surplus, both of the real and personal estate, after their age of twenty-one. It is true, there is a provision for the children by the marriage settlement, but that is not to take place until after their father's death."

“And,” he observed, “in this case, the testator, *Shepherd*, did not care to trust his son-in-law with providing for his children out of his own estate, not only during the time when their maintenance would be least expensive, (during their tender years, and when every parent is bound to provide for his children,) but even here he takes a care which seems unnecessary ; and can it be imagined that the testator would show a concern for his grandchildren when they did not want it, and leave off that care at the only time when they could be supposed to stand in need of it, viz. as soon as they should come of age and be marriageable? because it is plain the testator gives all from the heir-at-law, by vesting the whole estate in fee, as well as the legal property of the personal estate, in trustees, which would not have been done had any thing been intended to remain to the daughter and heir ; not only the interest, but the produce of the real estate, is to be applied by such trustees ; and to help this plain intention of the testator, the word *produce* shall be taken in the larger sense, and then it will signify, whatever the estate will yield, by sale or otherwise.

And this case is the stronger, in regard the son-in-law, the plaintiff, *Newland*, is to be a trustee, in case the other trustees shall all die ; but it cannot be intended that the plaintiff, *Newland*, is to be a trustee for himself, or for what himself would be entitled to should it come to his wife.”

It is true, that in *Fonnereau v. Fonnereau* (t), Lord *Hardwicke* observed, that he could see no reason to approve of this determination (u). But the point is now too firmly established to be shaken by the opinion of any Judge, however high his authority.

And *Challenger v. Shephard* (x) seems to have decided, in the most direct manner, that a devise of the legal estate to one in fee, in trust for another generally, would give the fee to the *cestui que trust*.

In that case, the testator devised in the following terms : " I give and devise to *W. Howe*, *R. Battiscombe*, and *R. Ames*, and their heirs, all that estate I lately purchased of *Mr. White*, called *Larke's Lease*, in the said parish of *Shipton*, in trust for *Joan*, the wife of *John Pippet*, and *James* her son, one moiety of the profits to be applied by my said trustees to the separate use of the said *Joan Pippet*, and the other moiety to be laid up, or otherwise improved, till the said *James* shall arrive at his age of twenty-one years; and my will is, that if the said *Joan* shall die during the minority of the said *James*, my said trustees shall lay up the increase and profits of the said mother's moiety, for the benefit of her said son; and after the decease of the said *Joan*, shall permit and suffer the said *James* to enter upon and enjoy *the whole* as soon as he attain his age of twenty-one years. Like-

(t) 3 Atk. 316.

(u) *Newland v. Shephard*, as reported in P. Wms,

(x) 8 Term Rep. 597.

wise, I give unto my said trustees those two acres lately purchased of Mrs. Sarah Brown, situate in *Croscombe* aforesaid, called *Ballimore*, in trust for the said *James Pippet*, to hold to the said *James*, and his heirs, for ever."

And the Court of King's Bench certified, that *James Pippet*, the son of *Joan Pippet*, took a beneficial interest in fee in the estate called *Larke's Lease*, under the will of the said testator, *James Cook*.

Lastly, the fee may pass by a devise *in a will, from a combination of expressions in that will, and from the general intention of the testator, to be collected from expressions contained the will (y).*

Grayson and Atkinson (z) is a case of this description. The case is reported in these words: "A testator, seised in fee, by will expressed himself thus at the beginning thereof: 'As to all my temporal estate wherewith it hath pleased God to bless me, I give and devise the same as follows.' He then gave several legacies to *A*, and directed him TO SELL all or any part of his REAL and personal estate for the payment of his debts and legacies, and desired three persons to assist him in the sale thereof, and to be supervisors of his will; and after giving some legacies to other persons, he concluded his will with this residuary devise: 'As to all the rest of my goods and chattels, real

(y) See Willes's Rep. 142.

(z) 1 Wils. 333; *Moore v. Heaseman*, Willes, 140.

and personal, *moveable and immoveable*, as houses, gardens, tenements, my share in the Copperas Works, &c. I give to the said *A* ; without making use of the word *estate*, or any words of limitation whatever."

The question was, what estate or interest *A* took in the real estate by this will? Lord *Hardwicke*, Chan. "I doubted, at first, but now am clearly of opinion, (as the testator had a *fee*,) that *A* takes a fee; there is no doubt but the testator, when he says, 'as to *all* my temporal estate, &c.' in the beginning of his will, intended thereby to dispose of *all* the estate he had in the world, both with regard to the *quantity* and *quality* thereof.

"2dly, There is no doubt but the inheritance is charged with his debts and legacies; and the word 'temporal,' is here put in opposition to his *eternal* or *spiritual* concerns, agreeable to Lord *Talbot's* construction, in the case of *Ibbetson* against *Beckwith*; and does not mean a life-estate or term of years, but as if he had said, 'all my worldly estate;' yet I do not say but that, notwithstanding these words, he might afterwards have qualified them, and made more particular, limited, or partial dispositions of his estate; *for intention at first is one thing, and the execution of that intention another.*

"It appears that he had it in view to dispose of the *whole*, when he directs that all or any part of his estate should be sold; for it is pos-

sible the debts and legacies might exhaust the whole : and though there is not the word *estate*, nor any words of limitation in this residuary devise, yet *A* takes a fee thereby ; for what is the word *rest* to relate to but his *temporal estate*, which he was disposing of ; for he says, ‘ as to the rest of my goods and chattels, real and personal, moveable and immoveable, as houses, gardens, tenements, &c. I give them to *A*.’ He has here explained by the words, *as houses, gardens, tenements, &c.* what he meant by his *goods and chattels, real and personal, moveable and immoveable* ; but, if he had not so explained himself, I do not think that the words *goods and chattels, real and personal, moveable and immoveable*, would have carried the lands by the law of England, though they might have so done by the civil law ; and the word *as*, is as much as if he had said I mean ; for a man is not confined to make use of legal technical words in his will, but may use what words he pleases, provided he explains his meaning clearly. All the rest, &c. plainly relates to something mentioned before ; and that mentioned before which he was about to dispose of, was all his temporal estate, which passes a fee where the testator has one.

And Mr. Justice *Wilmot* (a), observed, “ The statute only requires a will in writing, but requires no technical words. Therefore, if by sound, not indeed arbitrary construction, it

(a) 3 Burr. 1695.

appears that the intention was to devise in fee, it is immaterial what words are made use of; and all the circumstances and clauses are to be united and taken together, in order to collect this intention."

The principal cases, in which an estate in fee has passed in wills without words of strict and proper limitation, in favor of the supposed intention of the testator, will be found in this chapter. No case which gives rise to any particular inference, or rule of general construction, is intentionally omitted.

The rules which are submitted to the reader, comprehend the grounds or principles on which the several cases have been decided; and in cases which shall arise hereafter, the great, indeed the only, difficulty will be to apply the rules to the cases.

Few of the cases to be found in the Reports not introduced into this work, can ever be cited as precedents.

The principle on which they were decided may be urged; and that principle, it is hoped, will be found in this chapter. To have introduced all the cases, would have been an endless labour, and would not have answered any purpose of utility.

The addition would have swelled this Essay to a much larger size, probably to the great dissatisfaction of the reader. The object to which the author has chiefly directed his attention, has been to bring the cases into one view,

and arrange them under classes, and to refer them to the rule of construction by which they were governed.

He has frequently ventured to offer his observations on the determinations which these cases received; but, aware how liable he must have been to fall into some errors, on account of the difficulty of the subject, he would have the attempt considered by his readers, as made, rather with the desire of trying the extent to which his labours may be useful, than with the hope, that his endeavours will be attended with complete success.

In the discussion which has been offered, some cases (*b*) have been introduced, by way of distinction to the cases under consideration; showing instances in which the words of devise were not deemed sufficient to demonstrate an intention that the fee should pass. In many instances it has been held that the fee has not passed, and in other instances doubts have been raised, whether the words were, in point of expression, of that extent, to comprehend the *real* property of the testator, and to pass the fee of property of that kind.

It has been stated to be a general rule of law for the construction of the words of a will, as well as of a deed, that when *there are not any words in express terms, or of necessary conclusion, to give continuance to the estate*

(*b*) Cowp. 235.

after the death of the person who is to take under the limitation, he shall have merely an estate for life (c). The heir at law has a title till it can be shown, from the language of the will, that he is disinherited. As often as the devise is merely descriptive of the subject of property, and is to a person generally, without any particular circumstance, it is clear, that it is a gift to him personally, and merely for his life. These cases are not the subject of the present inquiry. The object of the reader should be to mark the cases which have involved particular circumstances, making a near approach to, but falling short of, the circumstance from which an intention to give a fee is to be inferred.

The writer of this Essay feels the propriety of remarking, before he closes the present chapter, that the words requisite, in deeds, to convey an estate in fee, are the words most proper to be introduced into wills, to express, with certainty, the quantity of interest to be devised.

The several cases classed under the several heads of devises, passing estates in fee, without any words of limitation, pass these estates by implication only (*d*); and no person who has a competent knowledge of his profession, and of its duties, will ever trust to the implication

(c) 9 Term Rep. 83, and References; Cowp. 238; Willea, 140, 141.

(d) See *Frank v. Frank*, 3 Mau. & Selw. 30.

of law, to give effect to the intention of his client, whose will he is compiling. He will use, as it is his duty, and as his professional reputation requires, the words strictly proper for the purpose, and those terms on which no doubt cannot, by any sophistry, or argument, be raised.

It is highly imprudent to rely on the Courts of Law or of Equity, for a decision in our favour, by a discretionary construction, when it is in our power, by a careful observance of cautious and correct practice, and approved forms, to demand that which we claim as due to us or to our clients in justice. It is absurd, often presumptuous, and always a proof of indifference to the interest of a client, to be content, under the idea that this or that form of expression, though not strictly proper, will answer the purpose. A man of honour and character will never think his labour finished till he can say with confidence to his client, and to his heart, (as far as settled rules of construction lead him to the knowledge of the force and effect of particular terms of a definite import, and warrant the expression,) this instrument shall not fail to ensure an observance of the intention with which it is made.

A D D E N D A.

“A devise to my relations, if that description suits *A*, has the same effect as a devise to *A* and his heirs. The devisee, where there is both real and personal estate, will take each, transmissible as such.” *Per Lord Eldon (e)*.

So a fee may pass by will, without words of express limitation, from the purpose for which the devise is made, as to daughters in augmentation of their portions (*f*).

To *A*, to give away at her death to whom she pleases, is a fee (*g*).

(*e*) *Walter v. Maude*, 19 Ves. 427.

(*f*) *Carpenter v. Carpenter*, 9 Mod. 92; 3 Bulstr. 127; *Hucks v. Hucks*, 2 Ves. sen. 568; *supra*, 276.

(*g*) *Timewell v. Perkins*, 2 Atk. 102.

CHAPTER VII.

On Conditional Fees and Estates Tail; and first, as to Conditional Fees.

THE doctrine of Conditional Fees, though of rare occurrence in modern practice, still forms part of our system of tenures.

It governs the law, as applicable to those hereditaments which are of a personal nature, or which, in a more general and comprehensive view, are not *tenements* entailable within the statute *de Donis* (a).

All limitations confined to the heirs of the body, either by direct or circuitous expression, and which are not estates-tail under the statute *de donis*, remain conditional or qualified fees at the common law (b).

In *Bacon's Abridgment* (chap. Estate-tail), there is, in a Note, this observation :

Fee-tail was originally termed the *feudum novum*, in opposition to fee-simple absolute or the *feudum antiquum* ; and went only to the *descendants*, either male or *female* ; according to the words and limitations of the feudal donation, and thence came to be distinguished into *feudum masculinum* and *fæmininum*.

The operation of the statute *de donis* is confined to lands and tenements ; hence it follows

(a) 13 Edw. I. c. 1.

(b) 1 Inst. 20. a

that nothing besides land, in its great variety, and those hereditaments which are collateral to lands, but issue out of them as rents, common, &c. estovers, nomination to a church, and those other hereditaments which create a tenure, as a peerage of a particular place or county, or are annexed to or exerciseable within any lands or tenements, though they lie not in tenure, as office of steward, bailiff of a manor, receiver, &c.; (c) *are within* the statute; but the statute doth not extend to those hereditaments which are merely personal; *as annuities*, or an annuity out of the four per cent. Barbadoes duties (d), or are to be exercised about *chattels*, *as* the office of a master of horses, hounds, &c.; and do not issue out of, nor concern any land, nor any certain place; since they do not savour of the reality (e).

Gifts of property of this sort, even at this day, pass conditional or qualified fees, and all the rules which, at the common law before the statute *de donis* were applicable to fees of this denomination, are at this day applicable to the like limitations of these hereditaments of a personal nature, as a part of that subject matter to which these rules were applied before the statute.

It may be added, that it has been supposed (f)

(c) 1 Inst. 19 b. (d) Earl of Stafford v. Buckley, 2 Ves. S. 170.

(e) Aubin v. Daly, 4 Barn. & Ald. 59.

(f) Chitty on Descents.

that the passage in vol. 1. p. 11, which treats a personal annuity in fee as an hereditament is erroneous.

The case of *Aubin v. Daly*, 4 Barn. & Ald. 59, is supposed to warrant the correction. It is not easy to comprehend whether more was advanced as law in that case, than that a personal annuity to a man and his heirs may pass in a will, under the description of personal estate, and without an attestation by three witnesses.

If the certificate of the Judges is to be understood to import the proposition, that an *annuity in fee* is personal Estate, and that it will devolve to executors and not to heirs, it may be safely stated that the point requires revision. All the authorities, including Blackstone (*f*), are in opposition to that doctrine; and even Mr. Chitty has passages in p. 12, which are in opposition to the certificate in *Aubin v. Daly*, taken in this sense (*g*).

Possibly, and even probably, the certificate in *Aubin v. Daly* turned on the ground that this personal annuity was not strictly and properly real estate, but fell within the terms personal estate and effects; and that the statute of frauds and perjuries having only the words "lands and tenements" did not extend to annuities in fee, being mere hereditaments, and not lands or tenements (*h*).

(*f*) 2 Bl. Com. 17. *supra*, 1 vol. 10. 12.

(*g*) On Descents.

(*h*) 2 Ves. S. 178, 179.

From these observations the propriety of entering into a minute discussion and nice investigation of the nature and qualities of conditional fees, is so obvious, that they supersede all necessity for any apology on the ground of taking up this learning merely for the sake of gratifying a speculative curiosity. Besides, the learning is applicable to copyhold lands not entailable by custom (*i*).

There is also great reason to expect that a gift of land to a man and his heirs generally, if he shall have heirs of his body, without any other expression to qualify the word heirs of his body, is, even at this day, a conditional fee; subject to the rules of the common law, and not an estate-tail under the statute *de donis*. (*k*.)

There is not any clause in that statute which extends to a case of this description, and estates-tail may be therefore defined agreeably to this hypothesis, so as to include those gifts only, in which by direct expression, or from words of qualification, the succession is confined to heirs of the body.

But such conditional fees as give the fee without any qualification or limit to the heirs are governed by the general rules of law, as distinguished from the law applicable to conditional fees, properly so denominated.

In the progress it will appear, indeed from the preceding observations it may be inferred, that no learning in the law is involved in greater

(*i*) *Infra*, ch. 8.

(*k*) *Fleta*, 3 lib. c. 9. p. 186.

obscurity, or attended with more disputable points, than that which concerns conditional fees, properly so termed.

The authorities are at variance (*l*).

The doctrine advanced on some points concerning this estate strongly contravenes the general and established rules of property; therefore in treating of this class of estates there is a more than ordinary degree of falling into error, especially as these estates rarely occur in modern times, and on that account the guide afforded by practice is wanting.

It has been assumed (*m*), that the doctrine of the common law, in respect to conditional fees, and the rights of alienation which they conferred, were very simple, and that all the perplexities of title originated with the introduction of estates-tail.

The writings of those authors who have been most deservedly esteemed for the solidity of their judgment, for the extent of their researches into the law, and for their almost intuitive knowledge of the science, have so little on the doctrine of the law applicable to this estate, which accords with the system of the law on estates in general, and that little seems so inconsistent in its several parts, that it is an arduous task to extract from the writings of these authors, any passages which can be truly useful in the inquiry to be now instituted.

(*l*) *Infra*, chap. 8.

(*m*) 1 Inst. 19. b.

Indeed the passages which occur in these books, instead of affording information, do, from their generality, and from their contrariety, and the absence of those distinctions which seem necessary to a correct understanding of the subject, occasion perplexity.

And it is probable that the present state of the law, as applicable to this species of estate, is not in strict accordance with first principles.

That the law may, in the first instance ; be well understood, such collections shall be made from works of the highest authority of points concerning this estate, as will most clearly show in what manner the law has been understood ; and many authorities will be subjoined in the eighth chapter to prevent the necessity of long quotations, and to assist the investigations of the student, so as to enable him to form his own judgment.

No writer has taken a more ample or masterly view of the subject than the author of *Bacon's Abridgment*, and it is probable that the learned Chief Baron *Gilbert*, the best historian of the law, was the writer of these observations.

Every opportunity will on that account be embraced of stating his view of this subject.

The leading principle relating to estates-tail of the present day, and consequently to the conditional fees of ancient times, is, that they were *fee-simple* at the common law, or, as

this expression must, with a view to accuracy, be explained, estates in fee (*f*).

The estates distinguished by the appellation of conditional fees received their denomination either from a condition expressly annexed to them, or implied by law; that the donee should have heirs of his body, either generally or of one sex in particular, as males or females; and should have *these heirs by any woman* or women, it was immaterial by whom, or by some particular woman; as the form of the gift prescribed that there should be heirs of one or the other description, in performance of the condition.

The statute *de donis* enumerates the state of the common law in these terms: First, concerning lands that many times are given upon condition, that is, to wit, where any giveth his land to a man and his wife, and to the heirs begotten of the bodies of the same man and his wife, with such condition expressed, that if the same man and his wife die without heirs of their bodies between them begotten, the land so given shall revert to the giver or his heir. 2. In case also where one giveth lands in free marriage, which gift hath a condition annexed, though it be not expressed in the deed of gift, which is this, that if the husband and wife die without heir of their bodies begotten, the land so given shall revert to the giver or his heir (*g*). 3. In case

(*f*) Litt. § 13: 1 Inst. 19 a.; 2 Inst. 336.

(*g*) Wright on Ten. 187, 188; 2 Bl. Comm. 110.

also where one giveth land to another, and the heirs of his body issuing ; it seemed very hard, and yet seemeth to the givers and their heirs, that their will being expressed in the gift was not heretofore, nor yet, is observed. 4. In all the cases aforesaid, *after issue* begotten and born between them (to whom the lands were given under such condition), heretofore such feoffees had power to alien the land so given, and to disherit their issue of the land, contrary to the minds of the givers, and contrary to the form expressed in the gift. 5. And, further, when the issue of such feoffee is failing, the land so given ought to return to the giver, or his heir, by form of the gift expressed in the deed, though the issue (if any were) had died ; yet, by the deed and feoffment of them to whom the land was so given upon condition (*h*), the donors have heretofore been barred of their reversion of the same tenements, which was directly repugnant to the form of the gift.

Fleta (*i*) has in express terms, proposed the law in his sense to be, that if a gift was made to a man *and his heirs*, if he should have heirs of his body, and there were heirs of this description, and they afterwards failed; his other heirs, and to the *remotest degree*, should succeed to him, because the condition was performed. His words are “ *Si sic dicas, do tantam terram cum pertinentiis habendum et tenendum tibi et hære-*

(*h*) *N.B.* Not said, made after issue born, but see No. 4.

(*i*) 3 lib. c. 9, p. 186.

dibus tuis. Si hæredes de corpore tuo habueris; si tales hæredes mihi procreavero; quamvis defecerunt succedent tamen mei, alii hæredes, mihi remotiores in infinitum, quia satisfactum est conditioni."

The authority of *Bracton* (ia) and of Mr. *Reeves*, in his history of the law, under the reign of Henry the Third, as stated by *Bracton*, may be cited in support of the same distinction, and from these writers it is clear that there was an established distinction between gifts to a man and his heirs of his body, and to a man and his heirs, if he should have heirs of his body (ib). Thus in the words of Mr. *Reeves*, following *Bracton*, as a gift might be made largely, so it might be *coactata*, and confined to particular heirs; as *tenendum sibi et hæredibus suis quas de carne sua et uxore sua sibi desponsata, procreatos habuerit; or sibi et uxori sue, or cum tali filia mea et tenendum sibi et hæredibus suis de carne talis uxoris, or filia ex euntibus, etc.* In these cases the inheritance descended to the particular heirs there specified, to the exclusion of all others; and should the person so enfeoffed have no such heirs, or they should fail, the land would revert to the donor by a tacit condition without any mention thereof in the gift. Again, a gift might be *tenendum sibi et hæredibus suis, si hæredes habuerit de corpore suo procreatos*, where, if the donor had heirs of his body, though they afterwards failed, yet he had satisfied the

(ia) *Bracton*, 17.

(ib) *Reeves*, 1 vol. p. 293.

condition, and all his heirs without distinction became entitled to inherit.

As soon as the donee had issue of his body answering the description required by the condition he became tenant in fee for three purposes ; first, to alien ; secondly, to forfeit ; and thirdly, to charge the land (*i*).

It is admitted that his alienation before any issue was born was good as against himself and his heirs (*k*) ; though some books deny that an alienation prior to the birth of issue was binding on the heirs (*l*).

From some authorities it may be inferred, that after failure of heirs of the body of the person to whom the estate was given, the person who gave the estate, or his heir, in his right, might, notwithstanding such alienation, prior to the birth of issue, have entered as in his reversion (*m*).

It is also said, that where the estate remained in the tenancy of the donee, or of his heirs under the original gift, (that is, without such alienation after the birth of issue), the land would on failure of heirs revert to the person by whom it was given in right or by way of reverter (*n*).

Also where the estate was granted to any particular heirs, as *to males*, these heirs were

(*i*) 1 Inst. 19 a.

(*k*) *Infra*, chap. 8.

(*l*) 1 Inst. 19 a ; 2 Ves. sen. 346.

(*m*) 1 Inst. 19 a ; 18 Ass. 5 ; *Infra*, chap. 8.

(*n*) 1 Inst. 19 a ; Finch's D. Co. Law, ch. 8 ; 1 P. W. 75. p. Powell ; 11 Ass. 5 ; 12 Edw. 4, 3 b ; Pain's Case, 8 Rep. 679 ; Finch's Law, 122.

entitled to take in exclusion of other heirs, though by this exclusion the course of descent was diverted (o); this proposition is not uniformly supported by the books.

Some books admit, while others deny (p), that any remainder could be limited after the gift of a conditional fee. Indeed in *Bracton* and *Fleta* there are passages in support of remainders, and *Bracton* wrote before the *statute* (q).

This passage occurs in *Bacon's Abridgment*, ch. Estates:—If lands were given to a man and the heirs *male* of his body, the issue *female* were “not inheritable, because the feudal donation expressing particularly what heirs of the donee were to inherit, no heir, though of the body of such feudiary, could inherit that did not come under the words and limitation of the donation.”

And if the donee had issue *two sons*, and died, and the eldest died leaving a *daughter* (r), the youngest son came into the succession of the feud, and excluded the daughter; and if there had been no son, the feud (for the collateral heirs were excluded, 1 Rol. Ab. 841) *reverted* to the donor, for the express words of the first donation, which regulated all subsequent descents, excluded all females from inheriting such feud; so *è contra*, if the feud had been given to a man and the heirs *females of his body*, the descent was to be conveyed to the

(o) 1 Inst. 19 a; 1 R. A. 841, s. 25. (p) 1 Inst. 13 a.

(q) Temp. H. 3.

(r) 1 Inst. 19 a; 7 Rep. 35 a.

females only, exclusive of all males, according to the words of the first donation.

But if the limitation of the feud had been to a man and his heirs male (*r*), thus omitting to add words of procreation, such donation doth not exclude the *females*, but lets them and all collateral heirs in, "and therefore this at this day is a fee-simple. 1 *Jones*, 105," because such donations not limiting the feud to the descendants of any body, cannot be good as a *feudum novum*; and if it be construed a *feudum antiquum*, the course of descent cannot be altered by any man's private fancy; and since it appears from the words of the donation that the donor intends an estate of inheritance, his words shall be taken most strongly against himself, and shall pass the most absolute estate of inheritance, which is a fee-simple, to which not only his *lineal* heirs, but also his *collateral* heirs are inheritable.

The author of *Bacon's Abridgment* observes, (s) the power of alienation was *not absolute* in the *feudum novum*, because such power might have been employed to disappoint the lord of his *reverter*; and yet they did not absolutely take away from such feudiaries the power of alienation, because that would have created a *perpetuity*, which was against the original policy of the *English* law. To come therefore to a temper between these extremes

(r) 1 *Inst.* 13 a.

(s) *Co. Lit.* 19 a; 1 *Plowd.* 246 a; 3 *Rep.* 346; 1 *Roll. Ab.* 840, 841; 2 *Inst.* 333.

the donee *was not allowed to alien* till issue had, because till then he had not a descendible estate in him, [this is not a tenable proposition] (s), and therefore could not transfer a descendible estate to others; and if he should have been allowed to have aliened, whether he had issue or not, such alienation would have disappointed the limitations and restrictions in the gift, which brought it back to the lord on failure of issue; and therefore they construed the words of the feudal donation not only as a limitation, but condition, which the feudiary was obliged to perform, before he had an absolute power over the estate; for such donations were generally made for the propagation of families, and therefore it best answered the design of such gifts to suppose the power of alienation to arise on the begetting issue; because in such cases the feudiary had the contingences of a family; for when issue was had they looked on the lord's possibility to be at a great distance, and they admitted of an absolute power of alienation. Therefore if a man had aliened before issue had, the lord could not have entered *for a forfeiture*, because that would have been contrary to his own donation, which carried it to the feudiary and his descendants; and therefore if *descendants* were *afterwards* born, the lord was excluded during the continuance of such issue, and the issue born after the alienation could

(s) 1 Inst. 19 b. *infra*, ch. 8.

able, and by that means not forfeitable for treason, though the condition should be performed by having issue; and from the time of this statute *the donor's possibility, or right of reverter, was turned into a reversion*; and the donor, who before had a fee simple *conditional*, had now but an *estate-tail*.

These are the principal, indeed they are the only *material points* necessary to be examined.

Suppose the estate to have been an estate in fee, either simply, or under a qualification, and the condition, to have affected the estate only in the event that the person to whom the land was given should not have any issue, or should not have any issue of a particular description, then, on general principles, the title would have stood in this predicament.

The person to whom the gift was made was tenant in fee, and as such he had the power of alienation in right of that estate, immediately after it was conveyed to him(*u*).

Arguments of analogy, drawn from the more early determinations on estates-tail (*x*), declaring the law to be that the tenants of these estates could not convey a more extensive interest than for their own lives, and a passage in *Briton* (*y*), gives to this opinion some semblance of doubt. But from first principles, the nature of estates, and the opinion of Chief Justice *Holt*, delivered in *Machel* and

(*u*) 2 Ves. sen. 346; 1 Inst. 19 b; *infra*, ch. 8.

(*x*) Bracton, lib. 2. c. 1. Took v. Glascock, 1 Saund. 259.

(*y*) *Infra*, chap. 8.

Clark(y), this mist of obscurity seems to be wholly removed ; and it is clear, indeed seems always to have been beyond all doubt, that tenants of conditional fees had this power of alienation over the fee as against their issue.

All the reasoning of Chief Justice *Holt* is applicable to estates-tail. The statute *de donis* did not enlarge the tenant's power of alienation ; and the necessary conclusion is, that as this power of alienation over the fee is exercisable by a tenant in tail, it equally resides in the tenant of a conditional fee.

Whether this conditional fee was in point of limitation to determine on failure of general or special heirs of the body of the donee, must, according to the general rules and principles of law, have depended wholly and entirely on the terms in which the estate was given ; and whether it should be defeated on that event, or by means of a condition annexed to the estate, could be decided only by referring, agreeable to the doctrine which has been advanced, to the agreement of the parties, as contained in a clause of express or implied condition. From our books, properly understood, it is to be collected, and they all, without exception, or at least with exceptions of some authorities, which are in this particular overruled, concede (z), that the

(y) 2 Lord Raym. 778 ; 1 Inst. 19, *infra*, ch. 8.

(z) 2 Ves. 346.

owner of this estate had the right or power of alienation as against his issue. Even Lord Coke (*a*) admits that when the gift was to the donee and his heirs generally, subject to a condition that there should be heirs of his body, and not to him and his heirs of his body, the person to whom an alienation was made would have a fee-simple, and not merely a fee determinable on failure of heirs of the body of the donee (*b*). Two points are perfectly clear :

1st. That under a gift to a man and *his* heirs, if he should have heirs of his body, and without any limitation over, there was not any right of reverter if the donee died after there had been heirs of that description (*c*).

2ndly. That under a gift to a man and his heirs of his body, there might be a reverter at any time when there should be failure of heirs, unless the donor and his heirs were barred *by alienation* (*d*). Alienation has been allowed on the ground *of policy* (*e*); or there might be a particular rule to enable the tenant of a conditional fee to alien after the condition was performed, although that rule cannot now be distinctly traced.

a) 1 Inst. 385. See ch. 8.

b) 2 Inst. on the statute *de donis*; Learning on Gifts in Frankmarriage, ch. 8.

c) *Hilton's case*, 18 Ass. fo. 57.

d) *Multon's case*, cited 18 Ass. 57.

e) Chap. 8.

The doctrine against *perpetuities* seems to have been introduced after the enactment of the statute of *quia emptores* (d). That statute favoured alienation; and the decisions relaxed the restraints imposed on alienation by the *statute de donis* (e). From the introduction of the learning against perpetuities, may, in all probability, be dated the enlargement of the power of alienation by a person who had a conditional fee, to him and *the heirs* of his body.

Under this learning, and not under general principles, alienations are allowed by *quasi* tenants in tail of copyhold lands, and under leases of freehold lands held for lives.

The peculiar form of a conditional fee, created by a gift to a man and the heirs of his body, did not give any right to the issue (f). It did not confer on them any interest beyond that which was common to all heirs, under any other form of gift. According to legal intendment the condition was not added in favour of the heirs, nor for their benefit. Its object was to circumscribe the continuance and the extent of that interest which was given, or to express the terms on which that interest should be held by virtue of the gift.

It is clear there were gifts of different sorts, and in various forms; sometimes general, subject to a condition, as to a man and his heirs, if he should have heirs of his body;

(d) 18 Ed. I. ch. 1.

(e) 13 Ed. I. c. 1.

(f) 1 Inst. 19 a.

in other instances qualified, as to a man and the heirs of his body (*g*); and that the circumstance under which each several gift was framed invited and received a different determination.

That limitations were often to the heirs generally, with a condition in the form proposed, will be evident from many grants in these terms made even after the statute *de donis*, and no doubt grounded on precedents of a more ancient date (*h*).

This distinction is more particularly manifest from the writings of *Bracton*, who compiled his treatise before the statute *de donis* was enacted, and from the author who compiled *Fleta* shortly after that statute was passed, and in the reign of the King to whose policy the issue in tail, reversioner, and remainder-man, are indebted for the statute *de donis*, &c.

The doctrine respecting *copyholds*, while it was under discussion whether they were entailable, affords a large portion of light on this subject (*i*).

As often as the gift was qualified to a man and his heirs of his body it was prior to the statute *de donis*, and is at this time perfectly consistent with the general rules of property, as stated in a former page, when estates of a qualified fee were considered (*k*), that the right of entering, as in his *reverter*, should devolve on the person

(*g*) 18 Ass. 5, per Hussey, ch. 8.

(*h*) 5 Hen. VII. 6; 19 Hen. VI. 75; Kitch. 153, ch. 8.

(*i*) See ch. 8.

(*k*) 1 Vol. 460.

from whose gift the estate was received, or on his general heir, when there should be a failure of those heirs, by whose continuance the donor had measured the extent of the interest he had granted. And by the interpretation of the statute *de donis*, these cases alone, in which the gift was in its descent, either in terms or by construction, restricted to heirs of the body, were objects of the provisions of that statute.

Even the common law had provided the *formèdon in reverter* (l), as the remedial writ for the grantor or his heirs after the determination of the gift by failure of heirs.

In special and analogous cases the law did by the statute *in consimili casu* (m), provide the *formèdon in descender*.

Of the condition when not performed, or rather when broken, advantage might be taken to defeat the estate to which the condition was annexed, till it became impossible that the condition should be performed.

The gift passed an estate in fee, entitling the person in whose favour it was made to the same power of alienation, and rights of ownership, as may be exercised by the tenant of any estate of that extent, and arising from a gift in that form.

In those instances in which the estate is given to the heirs generally, without any language in the direct gift, or in the context, to

(l) F. N. B. 219; 16 Plow. Com. *infra*, ch. 8.

(m) 6 Ed. I. c. 7.

confine the estate, so far as it confers an inheritable quality in favour of heirs of a particular description, the estate conveyed by the terms of the gift must, in point of limitation, continue for ever, unless it be defeated by a condition; and under what circumstances a condition will defeat the estate to which it is annexed, must, in these, as in all other, cases, have originally depended on the agreement of the parties, expressed in the condition, or of the intention which the law implies from any particular form of expression, though the intention of the parties be not declared in the terms strictly proper to a condition (*m*).

Even if a doubt could have been entertained on the extent of a limitation to a man and his heirs of his body before the statute *de donis*, cases of a date subsequent to that statute might be adduced as relevant authorities, and they would settle the question.

A rent *de novo* was granted in tail without any remainder over. The tenant in tail suffered a common recovery. This recovery was decided to turn the estate-tail into a determinable fee, and it was agreed that this fee would determine on the death of the tenant in tail, and failure of the issue inheritable to his estate.

The reason assigned for this decision was, that the grantor never stipulated to charge the land with the rent for a further period; and it

(*m*) Fleta, 3 lib. c. 3, § 5; 1 Inst. 385 a.

would be a wrong to the terretenant, *i. e.* the owner of the land, to burthen his estate with the rent for any longer time (*n*). Also, if the owner of a base or determinable fee creates an estate-tail, the donee in tail could by means of a common recovery acquire more than the estate of the donor (*o*). It is from the doctrine of the common law that these conclusions are drawn; and at the common law the same reasoning holds, as well in application to land, as to interests collateral to land.

The same determination ought most certainly at this day to be pronounced on a similar case, in regard to the grant of a mere annuity to a man and his heirs of his body.

No event which could take place, nor any act on the part of the grantee, ought to give to the estate a duration beyond the life of the grantee, and the continuance of the heirs of his body.

Though the succession and descent of the estate would necessarily be confined to the designated heirs, while transmissible to them, yet there would not be any restriction on the right of the alienation thereof.

Eventually as to a rent if remainders over were limited, the recovery might give an estate coextensive with the ownership under the estate-tail, and also under these remainders (*p*).

(*n*) *Chaplin v. Chaplin*, 3 P. W. 291.

(*o*) *Preston's Convey.* 1 vol. 3.

(*p*) *Smith v. Farnaby*; *Carter*, 52; *Siderf.* 285.

By the general rule of law applicable in ordinary cases to a condition and its operation, it is not material whether the condition be performed before or after any alienation is made.

The distinction which points to a difference between an alienation before the birth of issue, or after that event has happened, hath not, as already shown, any application in principle to a gift to a man and his heirs, if he should have heirs of his body, without any limitation over on failure of heirs of the body, so as in construction to restrict the gift to the donee and the heirs of his body.

Suppose a gift to have been to a man and his heirs of his body, and apply the mere decision that the land would on failure of those heirs revert to the person of whose gift it was received. The conclusion is easily to be reconciled with former determinations, indeed with all the decisions which have been pronounced on estates of a qualified fee; that the possibility of a reverter, or reversionary interest of the donor, shall become an estate, when there shall be a failure of those heirs.

At the common law, independently of the rule ingrafted by policy against perpetuities, there would be a reverter to the donor on a failure of the heirs, falling within the terms of a gift to a man and the heirs of his body, whether the alienation had been before or after failure of issue. But policy seems to have ingrafted the distinction on conditional fees to a person

and the heirs of the body, that the right of reverter may be barred by an alienation after, though it may not be barred by an alienation before the birth of issue.

The extension of estates may be considered as a departure from the general rules of law; and though it be applicable to things which in their nature are perpetual, as copyhold interests, it does not necessarily follow that it would be applied to things created *de novo*, as rent-charges, personal annuities, &c., since no absolute fee existed therein prior to the creation of the conditional fee (*q*).

The feudal law, which is the ground-work of all estates, especially of estates with a limited or special order of succession, would have restricted the right of enjoyment to the specified heirs (*r*) and denied the power of alienation.

Another quality ascribed to conditional fees leads to the conclusion that one sex may be called to the succession, and another sex excluded; and by a parity of reason the issue of a second wife may be called to the succession in preference to the issue of a former wife (*s*).

These positions are, beyond all doubt, contrary to the general law applicable to estates in fee-simple (*t*).

Limitations in these terms are not, as it hath been shown, allowed in the form in which they are expressed (*u*). The course of descent,

(*q*) 1 Preston Convey. 3. (*r*) Wright on Tenure. (*s*) Ch. 8.

(*t*) Ch. 8.

(*u*) 2 Lord Raym. 1149, per Powell,

s *ra*, 1 vol. 461 473, 475.

so far as the attachment of law by descent is to have place, must, as to estates in fee not being conditional fees, be directed in conformity with the general rules which the law has prescribed (s).

Although it is clear that there may be such special descent, there are not wanting, however, opinions to support a contrary doctrine as to conditional fees; for in *Idle v. Cook*, Mr. Justice *Powell* said, if lands at common law were given to a man and the *heirs males* of his body, and he had issue two sons, and the eldest had issue a daughter (t,) the second son should inherit, and not the daughter, because she was not within the terms of the gift; and in *Pain's* case (u) it is said, at the common law it was taken to three purposes; that the tenant in tail had a plain fee-simple, first, to alien; secondly, to forfeit by attainder of felony; so that although the tenant in tail afterwards died without issue, the land should *not revert* to the donor; and (speaking of the case of a woman having special tail), thirdly, to make the land descendible to her issue by *any other* husband; for as by her alienation she might make strangers to the blood to be absolutely inheritable, so by construction of law, after issue had, all lineal heirs of her body, by what husband soever they were begotten, should inherit her as a benefit, and incident *tacite*

(s) 1 Vol. of Est. p. 461.

(t) 1 Inst. 186.

(u) 8 Rep. 35.

annexed to her estate by the law." And *Markham's* case, Hil. 12 Edw. 4, fol. 2, is also an authority that before the statute *de donis* a second husband might have entitled himself to be tenant by curtesy, and a second wife to be tenant in dower of an estate, given upon condition that there should be issue, in the case of the husband, by another woman, and in the case of the wife by another man; and it seems at this day to be part of the essential qualities of a tenancy by the curtesy that the husband should actually have issue which may succeed by inheritance to the estate of which his wife is seised (*x*), and of a tenancy in dower, that the wife may bear to her husband such issue as may succeed to the estate of which he is seised during the coverture; and if it had been the rule that the issue by another husband, or the issue by another wife, were exclusively entitled to be called to the succession, under a special limitation, no title to be tenant by the curtesy would have arisen to any other husband; or a tenancy in dower have been conferred on any other wife (*y*).

The statute *de donis* also takes notice (*z*) that a second husband was entitled to be

(*x*) 8 Rep. 36.

(*y*) But possibly it is not altogether in consequence of the statute *de donis*, that this point forms part of the definition of the circumstances which must concur to complete the title of a husband claiming to be tenant by the curtesy, and of a wife claiming to have dower. See *infra* in the chapter on Curtesy.

(*z*) 8 Rep. 35 b; 2 Lord Raymond, 1129.

tenant by the curtesy, under gifts in special form, to his wife and the heirs of her body by a former husband; and *Fleta*, with reference to this diversity, in regard to estates-tail in those instances in which the heirs are to be begotten by some other person than the husband who claims the tenancy, says he is excluded, *eo quod palam inhibetur per statutum*; plainly intimating a difference on this point between the statute law, and the common law prior to the statute *de donis*, and showing the alteration effected by the statute.

The consideration that this able writer compiled his treatise at an early period after the statute *de donis* was passed into a law, adds greatly to the weight of his opinion, and affords the surest inference of his accurate knowledge of a change in the law so recently effected.

Indeed it is perfectly agreeable to decisions on other estates in fee, and to the general laws on property, that when the estate was circumscribed in its limitation to heirs of the body, the descent should be confined within the degree by which the continuance of the estate was circumscribed. Hence the observation of Lord *Eldon*, that originally an estate-tail was an estate upon condition, to become a fee when issue was had. It was then in the power of the tenant in tail to alien; but still it was not an absolute estate; as, if he did not take advantage of that power, and did not

alien, the estate would have descended according to the form of the gift.

It is more than probable that gifts within the statute *de donis*, and gifts at the common law, which are now, as they were formerly, merely conditional fees, have been confounded. Indeed the difficulty experienced at this day of discovering the nature and properties of conditional fees arises, almost to a certainty, from this circumstance. Even *Blackstone* (a), the most able commentator on our laws, would have it understood that a conditional fee was denominated by this name, by reason of the condition expressed or implied in the donation; that if the donee died without such particular heirs the land should revert to the donor. For this, says he, was a condition annexed by law to all grants whatsoever, that on failure of the heirs specified in the grant the grant should be at an end, and the land return to its ancient proprietor. The reason assigned exhibits the nature of the condition to which the commentator applies his observation. And in the instance of a gift to a person and the heirs of his body, the restriction is more properly termed a limitation than a condition.

Following this idea, (it may be admitted without any inconsistency,) he states, that a gift in the supposed form passed a qualified fee; and that the fee would, in consequence of the limited

(a) 2 Black. Comm. 110.

interest conferred by the gift, and the condition annexed to it, expressed by or to be inferred from the words of limitation, determine on failure of heirs of the body of the donee.

According to this esteemed writer, a conditional fee at the common law was a fee restrained to some particular heirs, exclusive of others, *donatio stricta et coarcta, sicut certis hæredibus, quibusdam à successionē exclusis*; as to the heirs of a man's body, by which his lineal descendants only were admitted, in exclusion of collateral heirs, or to the *heirs males* of his body, in exclusion both of collateral and *lineal females*.

Thus *Blackstone* favours succession by males through the male line, and he is correct.

Fleta, lib. 3, c. 3, § 5, is cited as an authority in point. The passage in Latin is the text of that writer.

But *Fleta* is treating of estates-tail under the statute *de donis*, and not of conditional fees. This passage will be given in ch. 8.

Bracton is the more appropriate authority for the text of *Blackstone*, and it fully, as do the general mass of authorities, support that text.

Whether remainders are admissible after and expectant on gifts of a conditional fee, is another disputable point; a point perhaps, and probably, not fully, finally, and exclusively settled (c).

The general rule of law undoubtedly is that no remainder can be limited after a fee ; and, certainly, a conditional fee is a fee ; but whether it is a fee within the meaning of this rule may be questionable.

The exclusion of remainders was unknown to the feudal system, and probably to the common law prior to the statute *de donis*. Lord *Hardwicke* admits that the king may grant a remainder, though it be a possibility ; and at the same time denies that a subject could grant such remainder ; many other authorities collected in the eighth chapter deny the validity of remainders.

These decisions, though opposed to the doctrine of *Bracton*, receive considerable support from the circumstance that no *formedon* in remainder lay at the common law ; but on mature examination of the authorities there might be a remedy, although a *formedon* was not the appropriate remedy.

As the argument is no longer tenable, that there was not a *formedon* in descender prior to the statute *de donis*, so, as a general principle, it would be difficult to deny that there might not have been a *formedon* in remainder, if such remedy had been essential to the purposes of title and justice.

The following deductions are of necessary conclusion as to conditional fees not being estates-tail :

- 1st A conditional fee is either general, by a limitation to all the heirs, without any restraint as to the series of heirs, or is qualified to the heirs in the direct descending line, *and to such heirs to the utmost extent, or within a certain degree*; subject in all cases to a condition, expressed or implied, that there shall be issue, either general, or special of the body of the donee.
- 2dly. All the rules applying to estates in fee are equally applicable to this estate, as to its creation and limitation, and the time of its continuance under the limitation; with the exception of the order of its descent, and the right by alienation to bar the donor.
- 3dly. When the limitation, expresses a gift to particular heirs, as heirs male, or heirs female of the body, the order of succession must be observed, so as to exclude heirs of a different description. Though the word males, as a word of limitation, describes an order of succession not allowed in the case of fees-simple, it shall not for this reason be rejected as repugnant to the gift of a conditional fee.
- 4thly. By the preponderance of authority no remainders are admissible after a gift of a conditional fee (*d*).

(*d*) This point is questionable.

- 5thly. The tenant of this estate has, as against his heirs, the same power of alienation, subject to the condition, as may be exercised by the tenant of a simple and absolute estate of the like extent, (2 Lord *Raym.* 773,) and with a right to defeat the reverter if the donee alien after issue born, or if the alienation be by an heir within the extent and terms of the gift.
- 6thly. An annuity created *de novo* by a gift to a man and his heirs of his body never can, it should seem, become more than a base fee.
- 7thly. The condition will operate to defeat the estate only in case the event described in the condition, or to be implied from it, shall happen.
- 8thly. If the condition shall be performed by the birth of such issue as is described in the condition, the estate will be a fee-simple, if limited generally; and a qualified or determinable fee if given under any restriction; and if it become general, and simple, no possibility of reversion will remain*; but if it shall be a qualified or determinable fee, the donor will have the right of entry when the time for the determination of the estate he has given shall, according to the terms on which it is limited, arrive,

* 18 Ass. 18 a; 18 Ed. III. 44, 46; 1 *Reeves's Hist. C. L.* 293. & *seq.* pages which prove the difference taken.

unless his right shall be duly and effectually defeated by alienation, nor, as it should seem, unless alienation be after the birth of issue,

This part of the present chapter cannot be concluded without an admission that the law on conditional fees is far from being in a clear and satisfactory state; and at some future period, and on a fit occasion, it will be the province and the duty of some luminous and correct mind, acting in judgment, to decide the many points resting on *dicta* rather than decision, and settle the law, as near as may be, conformably to the opinions which have been promulgated in modern times, however difficult it may be to decide conformably to the general rules applicable to other estates in fee.

CHAPTER VIII.

As this treatise was originally written on the quantity of estates, and on the language by which the quantity of estates may be measured or ascertained, many points which related to estates were not examined.

In its extended form, and with a view to exhibit and preserve the authorities which concern conditional fees, and the transition from conditional fees to estates-tail, the prominent authorities will be collected in this chapter.

Bracton (a) in treating of donations, says—
 “ Item sicut ampliari possunt hæredes, sicut prædictum est, ita coarctari poterunt per modum donationis, quod omnes hæredes generaliter ad successionem non vocantur. Modus enim legem dat donationi, et modus tenendus est contra jus commune, et contra legem, quia modus et conventio vincunt legem. Ut si dicatur. Do tali tantam terram cum pertinentiis in N. habendum et tenendum sibi et hæredibus suis, quos de carne suâ et uxore sibi desponsata procreatos habuerit. Vel sic—Do tali, et tali uxori suæ, vel cum tali filia mea, &c. habendum et tenendum sibi et hæredibus suis, de carne talis uxoris, vel filiæ exeuntibus, vel procreatis vel procreandis : quo casu cum certi hæredes exprimantur in donatione, videri pote-

(a) Lib. 2, c. 6.

rit quod tantum *fit descensus ad ipsos hæredes communes per modum in donatione appositum* ; omnibus aliis hæredibus suis à successione penitus exclusis, quia hoc voluit donator.” (b)

“ Item,” (says *Bracton*,) (c) “ poterit pluribus fieri donatio per modū simul et successive, ut si quis plures habeat filios, et sic fecerit primogenito donationem et dicat, DO A primogenito filio meo tantam terram, &c., habendum et tenendum sibi et hæredibus suis de corpore suo procreatis et si tales hæredes non habuerit vel habuerit et defecerint tunc terram illam do B filio meo postgenito et volo quod terra ad ipsum B, revertatur habendum et tenendum, sibi et hæredibus suis quos de corpore suo procreatos habuerit et si nullos tales habuerit vel si habuerit et defecerint tunc volo et concedo pro me et hæredibus meis quod prædicta terra revertatur ad C, tertium filium meum habendum et tenendum sibi et hæredibus suis quos de corpore suo procreatos habuerit et sic de pluribus. Et si prædicti A, B, C, sine talibus hæredibus de corpore suo procreatis decesserint tunc volo quod prædicta terra, revertatur ad me et ad alios hæredes meos ; quod quidem fieret sine expressione per tacitam conditionem nisi donator aliud inde ordinaret.”

Again, “ Item sexus facit hæredem propinquiorem ut si quis hæreditatem habens, et uxorem genuerit ex se filium vel filiam unam vel plures, si omnes fuerint hæredes anteces-

(b) *Fleta*, lib. 3, c. 9 ; *Britton*, c. 36. S. P. (c) *Lib.* 11. c. 6.

sois, masculus sexus semper in successione præferri debet sexui fœminino : nunquám enim ad successionem vocatur fœmina quamdiu aliquis hæres superfuérit ex masculis nisi contrarium faciat modus donationis ut eccè. Aliquis dat alicui terram in maritagium cum filia sua et hæredibus de corpore suo procreatis procreatur filia, moritur maritus, alius ducit matrem in uxorem generat ex ea filium, moritur mater, filia propinquior erit hæres et excludit masculum à successione et sic facit modus donationis filiam hæredem propinquiorem. Et excludit à successione sexum masculum (e).

The language of Britton, as translated by *Kelham*, and deposited in the library of Lincoln's Inn, is (Britton, chap. 36, of conditional *Purchases*, (f) "Notwithstanding (g) heirs are named in a purchase, yet no estate thereby accrues to the heirs; and it must be understood that where any one purchases to himself and his heirs he purchases to himself and his heirs near and remote; and to have and to hold from heir to heir, as well to those which are then begotten as to those which shall afterwards be begotten (h). And as heirs may by the form of the gift acquire a property in the purchase of their ancestor, so may they, by the form of the contract between the donors and the purchasers, be excluded from taking under a purchase ;

(e) Lib. 11. c. 30.

(f) p. 93 a.

(g) Bract. 17, c. 6, § 1; Fleta, 185, c. 8.

(h) Bract. 17, c. 6, § 1; Fleta, 185, c. 9, § 1.

for a covenant sometimes bars succession, and must operate according to the contract and will of the donors, as in cases like these. If any one (i) purchases to himself and his wife, and their issue begotten in lawful matrimony, in such purchase an error follows, the purchasers have only a *freehold* for their two lives, and the fee accrues to their heir-apparent, if there is any, and if none, then the fee remains in the person of the donor until they have issue; and in case the purchaser dies without issue, or has issue (k) which fails, the purchase shall revert to the donor; and if any one of the purchasers dies, the other shall retain the purchase for term of his life, and if they have no issue, and the tenant commits felony, the donor shall have the *reversion*, and the chief lord no escheat.

Fleta (l) has these passages, "Donationum alia simplex, et pura, quæ nullo jure civili vel naturali cogente, nullo præcedente metu, vel interveniente, ex mera gratuit à que liberalitate donantis procedit, & ubi nullo casu velit donator ad se reverti quod dedit, § 4. Alia sub modo, conditione, vel ob causam, in quibus casibus non propriè fit donatio, cum donator id ad se reverti velit, sed quædam potuis *fœdalis dimissio*, § 5. Alia absoluta et larga, et alia stricta et coarctata, sicut certis hæredibus quibusdam à successionem exclusis." And the same writer (m), when treating of conditional gifts, in contrast

(i) 2 Inst. 333.

(k) Bract. 17 b, c. 6, § 1.

(l) Lib. 3, chap. 3, s. 3.

(m) *Ibid*, chap. 9.

to those distinguished as simple gifts, proceeds in these words, “et sicut ampliari poterunt hæredes per modum donationis ita poterunt coarctari quod omnes hæredes ad successionem non vocabuntur hæreditatis antecessoris modus *enim* legem dat donationi & tenendus est etiam *contra jus commune*; quia modus et conventio vincunt legem ut si alicui cum uxore fiat donatio habendum et tenendum sibi et hæredibus quos inter se legitime procreabunt; Ecce quod donator vult quod tales hæredes in hæreditate paternâ et maternâ succedant aliis hæredibus eorum remotioribus penitus exclusis; et quod voluntas *donatoris observari debeat*, manifestè apparet per hæc statuta. Quia autem dudum Regi durum videbatur, quod in casibus in quibus ten. &c. &c.” Thus referring to the statute *de donis*. And again, in a subsequent part of the same chapter he observes, “Fieri etiam poterit donatio viro et uxori, suæ simul, hæredibus utriusque communibus, vel inter se procreatis, vel procreandis, vel eorum alterius tantum vel hæredibus ejus qui alium supervixerit.”

Fleta also admits (*m*) that there may be *remainders*; he also supposed (*n*) that before the birth of issue there was merely an estate of freehold.

Littleton observes, “Tenant in fee-tail is by force of the statute of West. 2, cap. 1; for before the said statute all inheritances were fee-

(*m*) Book 3, chap. 9, s. 9.

(*n*) Ibid, s. 5.

simple; for all the gifts which be specified in that statute were fee-simple conditional, at the common law, as appeareth by the rehearsal of the same statute (o)."

In *Coke on Littleton* (p), will be found the following passages: "*Devant le dit statute tous inheritances fuerent fee-simple*; here fee-simple is taken in his large sense, including as well conditional or qualified, as absolute, to distinguish them from estates in tail since the said statute. Before which statute of *Donis conditionalibus*, if land had been given to a man, and to the heirs males of his body, the having of an issue female had been no performance of the condition; but if he had issue male, and died, and the issue male had inherited, yet he had not had a fee-simple absolute; for if he had died without issue male the donor should have entered as in his reverter. By having of issue the condition was performed for three purposes: First, to alien; Secondly, to forfeit; Thirdly, to charge with rent-common or the like; but the course of descent was not altered by having issue; for if the donee had issue and died, and the land had descended to his issue, yet if that issue had died (without any alienation made) without issue, his collateral heir should not have inherited, because he was not within the form of the gift, viz. heir of the body of the donee. Lands were given before the statute in *frankmarriage*, and the donees had issue and

(o) Litt. § 13.

(p) 1 Inst. 19.

died; and after the issue died without issue it was adjudged that his collateral issue shall not inherit, but the donor shall re-enter. So note that the heir in tail had no fee-simple absolute at the common law, though there were divers descents.

“ If lands had been given to a man and to his *heirs males* of his body, and he had issue two sons, and the eldest had issue a daughter the daughter was not inheritable to the fee-simple; but the younger son, *per formam doni*. And so if land had been given at the common law to a man and the *heirs females* of his body, and he had issue a son and a daughter, and died, the daughter should have inherited this fee-simple at the common law, for the statute of *donis conditionalibus* createth no estate-tail but of such an estate as was fee-simple at the common law, and is descendible in such form as it was at the common law. If the donee in tail had issue before the statute, and the issue had died without issue, the alienation of the donee at the common law, having no issue at that time, had not barred the donor.

“ If donee in tail at the common law had aliened before any issue had, and after had issue, this alienation had barred the issue, because he claimed a fee-simple; yet if that issue died without issue the donor might re-enter, for that he aliened before any issue at what time he had no power to alien to bar

the possibility of the donor. But if feme tenant in tail had taken husband and had issue, and the husband and wife had aliened in fee by deed before the statute, yet the issue might have had a *formedon in descender*, for the alienation was on account of coverture, and unless there was a fine, &c. not lawful; but otherwise it is if it had been by fine. And these things, though they seem ancient, are necessary notwithstanding to be known, as well for the knowledge of the common law as for annuities, and such like inheritances as cannot be entailed within the said statute, and therefore remain at the common law. If the king before the statute of *donis conditionalibus* had made a gift to a man, and to the heirs of his body begotten, the donee *post prolem suscitatum* might have aliened as well as in the case of a common person. But if the donee had no issue, and before the statute had aliened with warranty, and died, and the warranty had descended upon the king, this should not have bound the king of his reversion without assets; but otherwise it was in the case of a common person. Of the other side, if lands had been given to the king, and to the heirs of his body, he could not before issue have aliened in fee, but only to have barred his issue as a common person might have done, but not have barred the reversion, for that should have been a wrong in the case of a subject; and the king's prerogative cannot alter his case, nor

make it greater than the donor gave unto him; and it is a maxim in law that the king can do no wrong.

“ When all estates were fee-simple then were purchasers sure of their purchases, farmers of their leases, creditors of their debts; the king and lords had their escheats, forfeitures, wardships, and other profits of their seigniorities; and for these and other like cases, by the wisdom of the common law, all estates of inheritance were fee-simple; and what contentions and mischiefs have crept into the quiet of the law by these fettered inheritances daily experience teacheth us.” But see more of this matter in the aforesaid chapter of warranty, sec. 746, and in his reading on the statute *de donis conditionalibus* (o).

“ Before this statute, 13 Ed. 1, c. 1, all inheritances were estates in fee, viz. either fee-simple absolute, or fee conditional, or a qualified fee; whereof you may also read in the first part of the *Institutes*, sec. 1.

“ And tenant of lands entailed had before this statute a fee-simple conditional subsequent; for albeit *Britton* (p), who wrote before this statute, saith, that if any purchase to him and his wife, and to the heirs of them lawfully begotten, the donees have presently but an estate of freehold for the term of their lives, and the fee accrueth to their issue, &c., taking

(o) *Inst.* 333.

(p) *Britton*, cap. 36.

the condition to be precedent, yet had the donees at the common law a fee simple conditional *presently* by the gift.

“ For if lands had been given to a man and the heirs of his body issuing, and before issue had before this statute (*q*), he had made a feoffment in fee, the donor should not have entered for the forfeiture ; but this feoffment had barred the issue had afterwards, which proveth that he presently by the gift had a fee-simple conditional, and this agreeth with the authority of *Littleton*, *ubi supra*.

“ Now for the better understanding of this act, seeing that the estate was conditional at the common law, it is necessary to be known when the condition was performed, and to what purposes.

“ If the donee had issue, he had not thereby a fee-simple absolute ; for if after he had died without issue the donor should have entered as in his *reverter*. But after issue had, the condition was performed to this purpose, that he might have aliened, and thereby have barred the donor and his heirs from all possibility of reverter for default of issue (*r*) ; for the heirs of his body (he having a fee conditional) might have barred them as well before issue (as hath been said) as after ; and to what other purposes the condition, by having of issue was performed,

(*q*) 19 E. 2, Formd. 61 : 30 E. 1, *ibid.* 65 *pl.* cited in Lord *Berkley's* case.

(*r*) See first part of the Institutes, Cap. Tail, s. 13.

vide the first part of the Institutes, *ubi supra. et hæredibus de ipsis.*"

For to a gift in tail made (s), this word (heirs) is requisite, unless it be in a case of a last will, &c.

Adjecta conditione expressa tali, &c. If this condition expressed had not been added the very gift would have implied so much.

"*In casu etiam cum quis dat tenementum alicui in liberum maritagium.* By this clause it appeareth that an inheritance passeth by these words *frank-marriage*, whereof we have in another place written at large (t).

In casu etiam cum quis dat tenementum alicui et hæredibus de corpore suo exeuntibus. This act having put two examples of estates-tail special, viz. the first to a man and to his wife, and to the heirs of their bodies; the second, of a gift in frank-marriage, a *special case*, and a special estate in tail; here he putteth a case of an estate-tail general, not that the makers of this statute meant to enumerate (u) all the forms of estates in tail, but to put these as examples so as all manner of estates-tail, general or special, are within the purview of this act.

"*Potestatem alienandi, &c. (x)*, that is to say, by fine, feoffment, release, or confirmation, but the tenant in tail had not only (y) *potestatem*.

(s) See the first part of the Institutes, s. 1 and 14.

(t) First part of Institutes, s. 17.

(u) 3 E. 3, 31, 32; 18 E. 3, 46; 33 E. 3, Tail, 5; Dier. 1 Mar. 96. (x) 8 E. 3, 379; 44 E. 3, 3.

(y) 7 E. 3, 368; 5 E. 3, 141, 7 H. 4, 31.

alienandi, but *foris faciendi*, &c. also; for if after issue had, he had been attainted of treason or felony, the land entailed had been forfeited, and thereby the donor barred of the possibility of reverter, and *foris facere* is *alienum facere*; and therefore in this act is included in these words, *potestatem alienandi*. And so might the tenant in tail, before the making of this act, have charged the land with rents common, or the like, to have barred his issue (y), but by this act he is restrained as well to charge as to alien.

“ But the having of issue before this act did not alter the course of descent, as in another place we have said (z).

“ *Exhærendanâ exitum eorum contra voluntatum donatorum*. Hereby it appeareth, that there were two mischiefs before this act (a), viz. first, the disherison of the issues in tail; secondly, that it was *contra voluntatem donatorum, et contra formam in dono expressam*, for the donor and his heirs were barred of the possibility of reverter: and both these were wrongs, for which at the common law there lay no remedy; for disherisons, and breaking the express will and intention of the donor, are wrongs which this act doth remedy *per formam in charta de dono, &c.* It was said before, *contra formam in dono expressam*, so as

(y) 3 E. 3, Formed, 46. See first part of the Institutes, s. 3.

(z) In the first part of the Institutes. *ubi suprâ*.

(a) Pl. Com. 247 a.

whether the estate were made by deed or without deed, it is all one to the intention of this act, and the most usual gifts in tail being of inheritance were by deed.

“ Again, upon these two branches, viz. that the will of the donor should be observed, and that the donor should not have power to alien, the Judges, by a threefold construction, did not only remedy all the said former mischiefs, but prevent all other that might arise.

“ Therefore, in execution of the will of the donor, and that he should have *no* power to alien either lands that lay in livery, or tenements that lay in grant, they adjudged that the donee should not have a fee-simple; but divided the estates, and created a particular estate in the donee, and a reversion in the donor; so as where the donee had a fee-simple before, by this act he had but an *estate-tail*, and where the donor had but a possibility before, which after issue might be barred at the pleasure of the donee, now by construction upon this act (b) the donor had the fee-simple expectant upon the estate-tail, which we call a *reversion*; so as by this division of the estates the donee after issue, or before, could not bar or charge his issue, nor for default of issue, the donor or his heirs, either by alienation, forfeiture, or any charge whatsoever.

“ *Sir William Herle* said of them that made

(b) 5 H. 7, 14, vide c. 4, verb. quando uxor dotata, &c. et verba non habeant aliud recuperare, &c. 9 E. 3, 22.

this statute, *Ilz fueront sages gents queux fieront cest statut*; and I may say as truly, *que ils fueront sages gents queux interpretont cest act.* And in another place he saith, *nous veiomus ceux queux seront le statut, &c. auxi en temps de quel roy le statut fuit fait, que fuit ne pluis sage roy que unques fuit et le cause del statut fuit; à saver le heritage en le sang ceux as queux le donc se fist.*

“The second construction was, that no lineal warranty should bar the issue in tail, unless there were assets descended in fee-simple from the same ancestor; but a collateral warranty made by a collateral ancestor should bar the issue in tail without assets: for that warranty is not restrained by this act, whereof we have spoken at large in another place (c); and so likewise the collateral warranty of the donee shall bar the donor, and is not restrained by this act, as well as the warranty of the donor shall bar the donee, as there also it appeareth.

“The third construction was, that albeit tenant in tail was restrained from power of alienations, yet of lands and tenements that lay in livery his fine or feoffment should work a *discontinuance*, and drive the issue in tail to his action; for seeing he had an estate of inheritance, the Judges compared it to the case where a man was seised in the right of his wife, or a bishop in the right of his bishopric, or an abbot in the right of his monastery, *et sic in similibus*;

(c) See the first part of the Institutes, Litt. s. 712.

and of inheritances that lay in grant, as of rents, advowsons, and the like, tenant in tail could not make any discontinuance, no more than the others before recited might do, which construction was made according to the rule and reason of the common law in other like cases.

Secundum formam in charta doni sui, &c.

“ This holdeth, though there be no deed, as before hath been said.

“ *Non habeant illi quibus tenementum sic fuerit datum (d)*. It was adjudged by *Beresford*, that the issues in tail should not alien, no more than they to whom the land was given; and that was the intent of the makers of this Act; and it was but their negligence that it was omitted, as there it is said. In this case by way of purchase the land is given to the donees, and by way of limitation to the issues in tail, and therefore by a benign interpretation the purview of this extends to the issues in tail.

“ *Nec habeat de cetero secundus vir, &c. (e)* These are but consequents to the words of the purview, and are but explanatory, and not of substance, and might well have been omitted.

“ Yet it was adjudged soon after the making of this Act (*f*), that where lands were given in frank-marriage, and the husband died, and the wife took another husband, and had issue before this Act, that the husband should be

(*d*) 5 E. 2, *Formedon*, 52; 4 E. 3, 29.

(*e*) Pl. Com. 247; *Sieg. Berklie's case*.

(*f*) 10 Ed. I. Form. 66; vide *Pasc.* 18 E. I. in banco. Rot. 27. in dower.

tenant by the curtesy; and the principal reason was upon this branch of the statute, *nec habeat de cætero secundus vir*, &c., for that this restraint proved, as there it is said, that the law before was, that he should be tenant by the curtesy, and yet without question the issue should not inherit that land.

“ Hereby it appeareth that a formedon in the *descender* lay not at the common law, but was given by this Act, and the form of the writ is here set down (g).

“ *Breve quod donator habeat recuperare deficiente exitu satis est in usu in cancellaria.*

“ The *formedon in reverter* did lie at the common law, but not a *formedon in remainder* upon an estate-tail, because it was a fee-simple conditional, *whereupon no remainder could be limited at the common law*, but after this statute a remainder may be limited upon an estate-tail in respect of the division of the estates.

“ *Sciendum est quod hoc statutum quoad alienationem tenementi contra formam doni impostorum faciendam locum habeat, et ad dona prius facta non extenditur.*

“ This clause ought to receive a twofold interpretation :

“ 1st. That *ad dona prius facta* must be intended of feoffments or alienations made by the donee or his issues, and not to gifts made by the donor, for to them this Act doth extend,

(g) Regula, 10 E. Formed. 55; 4 E. II. ib. 50; 21 E. III. 47; F. N. B. 211; Pl. Com. 240.

“ 2dly. *Dona prius facta*, that is *post prolem suscitata*, for then the alienation by tenant in tail, or his issues, was good in law; so as *dona* here are to be intended lawful gifts, and made in due manner, and such as could not be avoided, for law alloweth no wrong (*h*).

“ *Et si finis super hujusmodi tenementum imposterum levetur, ipso jure sit nullus* (*i*). This Act doth not make the fine void, but *ipso jure sit nullus*, that is, it shall not bind the right, yet it shall (as hath been said) make a *discontinuance*.

“ But now by the statutes of 4 Hen. 7, cap. 24, and 32 Hen. 8, cap. 34, a fine levied with proclamations doth bar the issue in tail; but a fine without proclamations is a discontinuance only, and no bar.”

Finch, in his book intituled “Law (*h*),” says, “a fee-simple is a fee-simple, conditional or absolute (*l*).

Conditional is a fee-simple to one and the heirs of his body; for that is a fee-simple at the common law, but the having of issue made it a more perfect fee-simple than before; which before issue cannot be alienated; after issue had,

(*h*) 4 E. II. Formd. 50; 12 H. IV. 7; 21 E. III. 45 Pl. Com. 246; first part of the Inst. s. 729, 730.

(*i*) 6 E. III. 20; 8 H. IV. 10; 33 E. III; Estoppel, 280; 33 H. 6. 18. (*k*) 121 of Edit. of 1678.

(*l*) 40 Eliz. pl. 250.

becometh an absolute fee-simple (*m*), and may be alienated or forfeited by attainder of felony ; but so, as if the issue fail before the alienation, the donor or giver shall have it (*n*)."

In the celebrated case of *Idle v. Cook* (*o*), Mr. Justice *Powell* observed, "That the sort of estate which is now, since the statute *de donis*, called an estate-tail, was well known before that statute, and that the statute did not create the estate ; but only preserved it : that there were three sorts of estates of inheritance at common law ; First, an absolute estate of inheritance to a man and his heirs ; Secondly, a fee-simple qualified as to the time of its duration, as an estate to a man and his heirs as long as J. S. has heirs of his body, or as long as *Bowchurch* stands, " or * * * * (*p*)," for in these cases, though the estate shall descend to a man's heirs, yet they shall have it for no longer time than is contained in the respective limitations ; Thirdly, a fee-simple restrained as to what heirs shall inherit it. And this was called a fee-simple conditional at common law : but that is not so to be understood, as if upon performing the condition a fee accrued ; for then it would have been the same case as a gift for life, with a condition, that if the donee did such an act, that then he should have a fee, and consequently, if the tenant in fee-simple conditional had aliened before issue

(*m*) 30 E. I. form. 85.

(*n*) 7 E. III. 36, 8, per 4 El. 11, pl. 240 ; 30 E. I. *ibid*.

(*o*) Lord Raym. 1148.

(*p*) Being an erroneous position is omitted.

had, it would have been a forfeiture of his estate, which was not so. But it was only a qualification as to what sort of heirs should inherit it; but the tenant in fee-simple conditional had an estate of inheritance in him before issue had; but it was qualified, *as to the descent of it*, to such particular heirs as were expressed in the limitation. And therefore, if lands at common law were given to a man and the *heirs male* of his body, and he had issue two sons, and the eldest son had issue a daughter, the (q) second son *should inherit*, and not the daughter, because she was *not within the form of the gift*."

Lord Chief Justice Lee's language (r) was, "And first, at common law all inheritances were fee-simple absolute, fee-simple conditional, or qualified fee. The donor had only a possibility of having the lands again; for the tenant of lands entailed before the statute had only a fee-simple conditional. If, before issue had, he had made a feoffment in fee, the donor should not have entered for the forfeiture; but this feoffment had barred the *future issue*; and after issue had, the condition was performed to this purpose, that he might have aliened, and thereby have barred the donor and his heirs from all possibility of reversion for default of issue; and as to the heirs of his body, he might have barred them as *well before*

(q) Acc. Litt. s. 23; Co. Litt. 24 b.

(r) 5 T. Rep. 107.

issue had as after. By having issue, the condition was performed for three purposes; to alien, to forfeit, and to charge; but the course of descent was not altered by having issue.

In Co. Litt. (s), Lord Coke observes, "But then it may be demanded, seeing that there was no reversion or remainder expectant upon any estate-tail at the common law, nor *the issue in tail* had any remedy by the common law; if the tenant in tail had aliened, then by what law is the alienation of tenant *in tail* a discontinuance at this day to the issue in tail, or to him in reversion or remainder?"

In 3 Rep. 4, this passage occurs, "He who hath the remainder expectant upon the estate-tail shall have a writ of error upon a judgment given against tenant in tail, although there were no such *remainder* at the common law."

Mr. Butler, in treating of the power of alienation by the owner of a conditional fee, adds (t), "This general power of alienation introduced conditional fees; one species of them was formed by a grant of land to a person and the heirs of his body. This mode of limitation operated as a settlement of the land, so far, that till the donee had issue inheritable under it, he could not alien or charge the land; but, after he had issue, the condition was supposed to be performed, and he might dispose of it at his pleasure. If he made no such disposi-

(s) 1 Inst. 327 a.

(t) Butler's Fearn, 563.

tion, the land descended to the *heirs of the body* of the grantee; and on failure of such heirs, it reverted *to the lord*. This was the first attempt in our law at a settlement of real property; and *Bracton*, 2 lib. c. 6, fol. 18 b, mentions that these limitations *might be so far multiplied*, that, on failure of heirs of the body of the first donee, the land might be *successively limited to others and the heirs of their bodies*."

In *Pain's* case (u), it is stated, after issue had, the tenant in tail at the common law had such a fee-simple, that his *collateral heir which is not heir of his body should inherit*. And if land were given before the statute to husband and wife, and the heirs of their two bodies; and they have issue, and the wife dieth, and the husband taketh another wife, she shall *be endowed*, as is held in 12 E. IV. 2, *Markham's* case; and, by consequence, the issue which she by possibility *might have* shall inherit the land.

Again it is said (x), "And at the common law, if lands had been given to husband and wife, and to the heirs of their two bodies begotten, and they had issue, and the husband died, and she took another husband and had issue, the second husband should be tenant by the curtesy; and so it is adjudged, 30 E. 1, *Formedon*, 66, which proveth that the issue by the second husband might inherit: for at the common law after issue, it was taken to three purposes that

(u) 8 Rep. 36.

(x) 8 Rep. 35.

the tenant in tail had a plain fee-simple, first, to alien; second, to forfeit it by attainder of felony, as the book is in 7 E. 3. 6 and 7 b. So that although the tenant in tail afterwards died without issue, the land should not revert to the donor." And again (y), "That the tenant in special tail, by having issue, had a full fee-simple to make the lands descendible to her issues by any other husband: for as by her alienation she might make strangers to the blood to be absolutely inheritable; so by construction of law, after issue had, all lineal heirs of her body, by what husband soever they were begotten, should inherit to her, as a benefit and *incident tacite* annexed to her estate by the law; for it was said, that by the having of issue, it was a gift and disposition in law to the husband for his life; which disposition and alteration of the estate, although it be for life, *tacite* as an incident to it, makes the issue of the second husband inheritable."

In other pages it is said (z), "At the common law before the statute of *donis conditionalibus*, If lands had been given to one and the *heirs male* of his body, in that case as well *the donor as the donee* had a possibility; the donor of a *reverter*, if the donee died without issue *male*, and the donee to have power to alien if he had *issue male*. For if the donee had issue a son, now to some intent the condition was performed, for *post prolem suscitata*, he had

(y) 8 Rep. 70 b.

(z) 7 Rep. 35.

potestatem alienandi; and the reason thereof was, because that he having a fee-simple, and having issue, *his issue could not avoid the alienation*; because he claimed fee-simple; whereof the father might bar him. And although that the donee and his issue also, after such alienation died without issue; yet the donor, who had but a possibility or a condition in law, and *no reversion or estate in him*, could not have recovered the land against the alienee; for by the having of issue the condition was performed as to this intent, *sc.* to make any alienation. But in the same case at the common law, if the donee had issue a son and dieth, yet the son had not an absolute fee-simple in him, but only the same power which his father had, *sc.* to alien; and if such issue died without issue, and without making of any alienation, the land did revert to the donor, as *Brian* holdeth, 12 E. IV. 3, and 18 E. III. 46, by *Huse*. For a collateral who is not heir of the body of the donee is not within the form of the gift; the limitation being to the *heirs male* of the body of the donee, which limitation of heirs male of the body, doth exclude *all collateral heirs* for ever to inherit. But the policy of the law was, to give power after issue to alien for two causes; one, that an estate of a purchaser should not be avoided by a remote possibility, *sc.* if the donee and his issue should die without issue; another, if he having a fee-simple should not have power to alien after.

issue, it should be in a manner a *perpetuity*, and a restraint of alienation for ever, which the common law for many causes would not suffer. And in 4 H. III. Formedon, 64, it is adjudged, that where lands were given in frank-marriage, and the donees had issue and died, and afterwards the issue died without issue; that his collateral heir should not inherit; for the *donor* recovered the land in a formedon in the reverter: and in the said case, if the donee hath issue two sons, and dieth, and the eldest son hath issue a *daughter*, and dieth without issue male, the younger son shall inherit a fee-simple, *per formam doni* at the common law: so if lands were given to one, and to his heirs female of his body, and he hath issue a son and a daughter and dieth, *the daughter shall inherit* an estate in fee-simple *per formam doni*. And mark well, the statute of *donis*, &c. doth not create an estate-tail; but of such estate as was fee-simple conditional; and descendible in such form at the common law, as now by the statute the land shall descend; and the only mischief was, that the donee after issue had power to alien in disinheritance of his issues, and bar of the reversion; but it doth not appear by the said Act, that although that the donee had issue, yet he had not an absolute fee, so that the collateral heir of the issue should inherit; for the words of the Act are, *Et præterea cum deficiente exitu de hujusmodi feoffatis, tenementum sic datum ad donatorem*

vel ad ejus hæredes reverti debuit, per formam in carta de dono hujusmodi expressam, licet exitus, si quis fuerit, obiisset, *per factum* tamen et feoffamentum, &c. exclusi fuerunt hujusque de reversione, &c. by which it appeareth, that if the *heir in tail dieth without issue*, and without any alienation made, that the land shall revert, and by consequence shall not descend to the collateral heir, 30 E. I. Formedon, 65. If the donee in tail alieneth before the statute, and afterwards hath issue, and then the issue dieth without issue, the land shall revert: for he had not *power to alien* at the time of the alienation, but such alienation shall bar the issue, as it is adjudged in 19 E. II. Formedon, 61, because that he claimeth fee-simple: Note, these rules yet hold place in case of a grant of an annuity to one and the heirs male of his body, and all other inheritances which are not within the statute de donis conditionalibus."

In *Turner v. Turner* these passages, proceeding from Lord *Loughborough* (a), occur: "An annuity when granted with words of inheritance is descendible, but as to its security is personal only, may be granted in fee, of course as a qualified conditional fee, but it is not entailable.

"It has been argued, that *no remainder* can be created, no limitation over can take effect as an executory devise. But of that I am not

(a) Ambl. 782.

so satisfied, provided the person so intended to take be described by proper words; as if to Nathaniel Richard Turner for life, and if he die without leaving issue male at his death, then to Charles, it would be good. But it is unnecessary to give a decisive opinion upon that part of the case, as it is clear that *no limitation of an annuity can tend to a perpetuity*. By the rules of the common law, *there is no possibility of limiting over such an estate.*"

In *Earl of Stafford v. Buckley* (b), Lord *Hardwicke* made the following observations: "The proper kind of limitation that it [an annuity] is capable of, is distinct from mere personal goods and chattels. The testator, having purchased it, was *seised in fee of it* at the time of making the will; and might direct it to be settled as far as by law *allowed to be so*; not by way of strict entail; because *not within the statute de donis; according to Lord Coke*. No writ of entry could be brought of it; nor is it real estate. And the very statute itself shows it in the beginning of it, nothing being included therein but *lands and tenements*, and what partakes of their nature: and Co. Lit. 20, says, in all these cases *grantee has a fee conditional as before the statute*. The settlement then to be made of it, supposing the first question that it is included in this power in the will, is in this manner: To the daughter for life and the heirs of her body; which is in her a fee-

(b) 2 Ves. S. 180.

simple conditional. The executors then clearly could not carry it over in remainder to the nephews; for *no remainder could be created of any estate not within the statute de donis*; for before it was a *possibility of reverter*, out of which a remainder could not be; upon this notion, that being but a possibility it could not be grantable over; and if before the statute *de donis* a man had granted lands to another and the heirs of his body, and said in default of such issue over to *B* and his heirs, that *grant over had been void*; and on the having issue the condition had been performed, and the *grantee himself* might have aliened so as to have barred the possibility of reverter. So here as this annuity is not within the statute *de donis*, if settled according to this will to her for life and the heirs of her body; if carried over in default of such issue to the nephews, that would have *been void*: as soon as issue had, the condition is performed; she might have aliened, and barred the possibility of reverter to the donor. Here issue has been had: and consequently an absolute fee must be, if a settlement is made according to this will. This I take to be the legal construction of this devise, according to the different nature of these estates; and this (for I would not be misunderstood) will not affect those grants, to which this has been compared, which have been frequent, of *annuities by the Crown* of this kind with remainders over; for though a com-

man person cannot grant a possibility, the Crown can; as it may grant a chose in action; and according to *Miles and Williams*, 1 Wil. 252, (which is truly reported) his grantee may sue for it in his own name; although a common person cannot grant a chose in action so as to enable grantee to bring an action in his own name. *I do not take it* that before the statute *de donis* the possibility of reverter in *the Crown could be barred*; which differs all these grants of the Crown from cases of common persons. Therefore, on the directions in this clause, if a settlement had been made, the executors must have settled it to the daughter; and the heirs of her body so as to be a fee conditional with a power after issue had to alien, and to prevent possibility of reverter."

Lord *Hardwicke*, in a subsequent part of the same case (b), added, "For as it is to be admitted to be out of the statute *de donis*, the consequence would be, that any estate they could have created would be but a fee-simple conditional; and they could not have carried it further, but must have stopped at *James* and the heirs of his body; for if they had attempted *a remainder, it would* be undoubtedly *a release* and discharge of the condition, for which I rely on the case in *Carthew*, that a fee-simple conditional cannot stand *together with an absolute fee*, but will be merged in it; the reason of which holds just to this; and there *was no*

(b) 2 Ves. Sen. 355.

case before the statute *de donis*, where an estate was granted as a conditional fee to one and the heirs of his body, and the same estate limited to *his heirs or remainder to another*; it could not be done, at least by a common person: I will not enter into the question, whether it could be granted by the *Crown* by prerogative."

By Lord *Hardwicke* it was said (c), "Though by the customs of several manors copyhold estates cannot be entailed, yet they are capable of such limitations as may make them fee-simple conditional."

Mr. *Watkins*, citing the authorities (d), observes (e), "Now we find it expressly adjudged, in several cases, that the statute shall not attach upon a mere limitation to a person and the heirs of his body; but that such limitation will give a fee conditional at common law; and that the tenant may alien in fee-simple immediately on his issue had."

"However, it is laid down in other books," says Mr. *Watkins* (f), "that if a limitation of a copyhold to one person and the heirs of his body, with remainder over to another, has been customary in a manor; or if, on a grant to one and the heirs of his body, the issue has avoided the alienation of his ancestor, or recovered in a formedon in descender, it will, with the co-operation of the statute, be a good entail (g)."

(c) 9 Mod. 484.

(d) Cro. Car, 42; Rowden and Malster, Godb. 367. S. C. and the cases there cited.

(e) *Watkins* on Cop. 154.

(f) *Watk.* on Cop. 156. (g) See Co. Litt. 60 b. 2 Ves. 601.

“ But if a limitation to a person and the heirs of his body, with remainder over to another, could have been before the statute, and this must necessarily be pre-supposed before we can conceive such statute to co-operate with customs, we may ask, what was the nature of the particular estate? Was a remainder permitted on a conditional fee? If not, and such estate was therefore neither a fee conditional, nor an estate-tail, what appellation can be assigned to it? And, consequently, as such estate was certainly an estate of inheritance, and yet, as certainly, not an estate in fee-simple absolute, if it was not a fee conditional, how can it be true that all estates of inheritance were either fee-simple absolute or conditional before the statute?

“ If such limitation had been by custom, and the alienation of the ancestor could have been avoided by the issue, the estate seems to have been that very estate which the statute is supposed to have established; and so to be properly an estate-tail (call it what you please) without its aid; since the direct end of the statute was to prevent alienation. And, consequently, such estate would have been before the statute. As to avoiding the alienation by a formedon in descender, it may suffice to remark, that the formedon must either have lain at the common law (*h*), or been given by the statute *de donis*; and, consequently, if such

(*h*) See Plowd. 235; 2 Inst. 336; Co. Litt. 60 b.

formedon was at the common law it must have been before the statute; and if not, it was the effect of that very statute, and not of any thing with which that statute could co-operate.

Now if a custom to grant a copyhold in fee-simple will warrant a grant to a person and the heirs of his body, with remainder over (*i*), such limitation would have been good in all manors where a fee-simple might have been granted, as well before as since the statute. Since custom must have been immemorial, and consequently anteriorly to such statute. Now if the statute will co-operate with such limitation so as to effect an estate-tail, it seems to follow that entails may be effected in all manors where a grant in fee-simple is allowed. When such a limitation of copyholds is only regarded as conveying a conditional fee, the person to whom it is so limited may, on issue had, convey it to another in fee-simple by a common surrender (*k*).

Mr. *Watkins's* observations tend strongly to prove the existence of *remainders* at the common law; and when it is considered that our system of gifts and limitations is derived from the feudal law, it will be evident from the books on the feudal law, and from Sir *Martin Wright's* Book on Tenures, (p. 25), that limitations of remainders after qualified or limited estates of inheritance were in common use; and in Scot-

(*i*) *Staunton v. Barnes*, ante, p. 47.

(*k*) Cro. Car. 42; Rowden and Malster.

land, though their laws have not any estates-tail properly so called, yet they admit of successive estates in fee by way of substitution.

In the report of *Willion v. Berkley* (1) will be found the most ample collection of learning on this subject; and it was the intention of the author to have introduced extracts of the more material and relevant parts of the report, but they ran to so large an extent that the author did not feel justified in increasing the bulk of this work by its insertion, although in his judgment this chapter would have been greatly improved by its insertion.

(1) Plowd. 223.

CHAPTER IX.

On Estates-Tail.

AN estate-tail is an estate of *inheritance*, to a man or woman, and his or her heirs of his or her body, or heirs of his body of a particular description, or to several persons and the heirs of their bodies, or the heirs generally or specially of the body or bodies of one person, or several bodies. For an estate-tail must be confined to the descendants of some individual living or dead, or of two persons, being husband and wife, or who may lawfully intermarry.

When two persons are tenants in common in tail, each as to his or her share is to be considered as a distinct donee in tail. But two persons may be joint-tenants of the mere freehold, and each have a distinct estate of inheritance, or the inheritance may be in one of them only.

As to an individual, an entail is an interest to continue as long as the person to whom the gift of this description is originally made shall have heirs of his body, either generally, or of some particular description. During its continuance as an estate-tail, and for that period only, it will devolve on these heirs, and these heirs only.

It is also to be observed, that a person may

have an estate-tail, and yet all the issue shall be barred to inherit, or be incapable of inheriting as the children of an *alien*, or because they are barred by the peculiar operation of a fine with proclamations, by one of several ancestors (a).

According to *Comyns* (b), an estate is said to be entailed when it is ascertained what issue shall inherit (c).

This exposition does *not* give an accurate notion of an estate of this quality. There is not any characteristic point of distinction, since the definition is equally applicable to a gift of an estate for lives to a person and the heirs of his or her body.

The extent of the limitation, or the peculiar form of the gift, marks the quantity of the interest.

As soon as there is a failure of those heirs which the gift describes, the estate will determine, unless it be extended by the operation of a common recovery, or by *discontinuance*.

For this reason it is important to advert to the event which in point of law occasions a failure of heirs.

Now a failure of heirs universally happens as soon as there is a defect in the line of those heirs in whose favour the *entail* is created.

(a) *Brown's Ca.* 3 Rep. 50. b. ; *Beaumont's Ca.* 9 Rep. 140. b. ; *Baker v. Willis* ; *Cro. Ch.* 476 ; *Errington v. Errington*, 2 Bulstrode, 42. (b) 4 Com. Dig. 6. (c) Litt. s. 8.

With a view to estates in fee-simple, and other fees not being entails, inheritable blood, and consequently the denomination of heirs, ceases on the *attainder* of a person convicted of treason or felony.

This doctrine is not equally applicable to estates-tail, even when the attainder is for treason (33 Hen. VIII. c. 20), for by attainder of tenant in tail for felony or treason the blood of his issue as heirs in tail is not corrupted.

The statute *de donis conditionalibus* (d) prevents the bar to the issue by any act, and consequently by the crime of their ancestor. Subsequent statutes merely give a title to the Crown by forfeiture; and by their operation disinherit the issue (e). In truth the issue in tail succeed in the character of issue under the entail, and not under the description of heirs (f).

Thus though a tenant in tail is convicted of treason or felony, yet so far as no forfeiture is incurred the issue may take as heirs in tail. And when tenant in tail is attainted of treason, and there is a forfeiture of the estate-tail, the character of *heir* so far continues, that the Crown shall hold as long as there shall be any issue who might have inherited under the entail.

This proves that there is not any corruption

(d) 13 Edw. I. c. 1.

(e) 3 Abstr. 313, Airley Peerage, Appendix, No. 1.

(f) Vin. Abr. title, Blood, corrupted, 3 Abstr. 393.

of blood of the heirs *quasi* heirs of entail, so as to determine the estate.

The existence of inheritable blood in the heirs in tail, even after attainder for treason, is further proved by this case. If there be grandfather, father and son, and the grandfather is tenant in tail, and in his lifetime the father is attainted of treason, and executed, the grandson may succeed to the grandfather as tenant in tail; and yet he could not succeed as general heir to the grandfather.

This is one of the many anomalies of the law of corruption of blood.

The gift by which an estate-tail is to arise must, either in terms, or in legal construction, be made to the heirs of the body. For it is more in respect of the particular heirs to which the limitation is confined, and the restriction by express words or by implication, that the heirs shall be of the body, than of the time of continuance under the gift, that the estate is denominated; for though a gift to a man and his heirs of *his body* convey an estate-tail (g), a conveyance to a man and his heirs so long as he shall have heirs of his body, without any limitation over, and without words of explanation to show that the heirs to succeed under the gift are to be those only which shall proceed from the body of the donee, passes an estate *in fee*, and not in tail.

Again, although a gift to a man and his heirs

(g) See observations on this point, *supra*, 118.

of his body conveys an estate-tail, a limitation to a man who is a bastard, and to his heirs, under which no person except his lineal descendants can possibly entitle themselves by right of succession, passes an estate in *fee-simple*.

The like point is applicable to a denizen.

Distinctions arising on wills will be noticed in the sequel. The difference is between a gift to a man and his heirs of his body by express limitation, or by necessary implication; and a gift, which from the particular situation of the party cannot give a right of succession to any other persons, than those in the direct descending line.

The only way of accounting for the difference is to say, that a gift of the former description is within the statute *de donis*, and that a gift of the latter description is not within that statute; that the gift of the former sort is to have continuance under the limitation so long only as there shall be heirs of a particular description, and that the gift in the other form passes a *fee-simple*, which, though it cannot descend from the bastard or denizen to any other persons than his lineal descendants, owing to his peculiar situation, and because the character of his heirs cannot be fulfilled in any other persons than his descendants; is transmissible through the medium of a transfer to any other person, with a general power of alienation and an unlimited right of succession.

To propose one other point of difference : the gift must be to the person, and either immediately or mediately, according to the rule in *Shelley's Case*, to the heirs of his body, so that the heirs are to take in succession from him, and as his heirs of his body. For, notwithstanding the children, and other issue of the person to whom the gift is made may become entitled to the land, as his first and other sons or his *daughters*, in their character of such sons or daughters, or by their proper names, and consequently as purchasers, they have the land originally in their own right, and not from their parent ; and as their ancestor will not have an estate-tail.

And if an entail on the heirs of the body as purchasers be created, that entail will commence in the issue (*h*), as stated in the first volume (*i*).

Again, every limitation to *a man and his heirs of his body* does not create an entail.

That the land may be entailed, it must be limited for an estate of inheritance, according to the division of estates into those which are of inheritance, and those which are not of inheritance ; and therefore a gift to take effect through the medium of an estate of mere freehold, or of a chattel interest, does not create an entail within the statute *de donis* (*k*).

(*h*) *Mandeville's case*, 1 Inst. 26 b. *Southcot v. Stowell*, 2 Mod. 207. *Willis v. Palmer*, 5 Burr. 2615. (*i*) 1 vol. p. 279.

(*k*) An instance of a gift in tail to continue for years will be introduced in a subsequent page.

On this head some further observations will be offered in the chapters on *Estates for Lives* and for *Years*.

According to the determinations, a limitation to a man and his heirs so long as another person shall have issue of his body, and a limitation which in terms, or in construction of law, is to a man and his heirs of his body, afford another point of distinction. A limitation of the former description will cease by a failure of issue for any time however short, though there shall be issue of that description at a future period (*k*); while under a limitation of the latter description, the entail will revive on the birth of such issue as are within the terms of the gift (*l*). In intendment of law the estate always had continuance, even while no issue were in actual existence.

An estate-tail may be either absolute (as to a man and his heirs of his body, or heirs of his body of a particular description, and either generally, or determinable on a collateral event), as to a man and his heirs of his body so long as a tree shall stand (*m*), or until C. returns from Rome (*n*), or to a man and his heirs males of his body till he shall do a particular act, or till a particular act shall be done by some other person; and such quality

(*k*) Noy, 132; 10 Vin. Ab. 223; pl. 17.

(*l*) 10 Vin. Ab. 229; s. 8, pl. 2; 230, pl. 1.

(*m*) 1 Mod. 111; Fearne, p. 9, J.

(*n*) *Arton v. Hare*, Poph. 97; Fearne, 4.

may be annexed to it by express stipulation, or may arise from the nature of the estate out of which the entail is supplied; and this estate may, by a condition, be made liable to be defeated on any event, consistent with the rules of law, which shall be agreed on for that purpose.

And when the estate, out of which the entail is derived, is in its nature of the quality of a determinable fee, the event on which the original estate is to determine will, in construction of law, be a collateral determination to, and will circumscribe the continuance of, the derivative estate-tail.

The statute of limitation of the Crown, which settled the regal dignity and powers on the princess *Sophia* of Hanover and her heirs of her body, being *protestants*, also a gift to a man and the heirs of his body by a woman of the name of *Searle* (n), afford examples of estates-tail, with collateral determinations, and the limitations may be varied in any manner, according to the agreement of the parties.

The estate, though determinable by express limitation, or by construction of law, may, by a common recovery regularly suffered (o), become an estate in fee-simple; admitting that the person by whom the estate-tail was created was the owner of an estate of that extent.

(n) *Page v. Hayward*, 1 Salk. 570.

(o) *Benson v. Hodson*, 1 Mod. 105; *Page v. Hayward*, Salk. 570; *Driver v. Edgar*, Cowp. 379; *Gulliver v. Ashby*, 4 Burr. 1929. *Preston*, 1 Convey. 3.

If he had only a determinable or qualified fee, it seems now to be the prevailing opinion (*p*), that the estate taken under the recovery, will not be more ample than the estate of the person who created the entail.

And a common recovery suffered by a person who was tenant of a rent-charge originally given to him or his ancestor in tail, without any remainder over, passes only a fee determinable on the failure of the issue, inheritable under the entail.

The reason urged for this decision is, that the grantor never intended to charge the land with a rent for ever; and it would be a wrong to the terre-tenant to burden his estate with this charge for any longer time (*q*) than is limited.

But if there are remainders over the recovery may give an estate co-extensive with these remainders (*r*).

That the estate taken under a common recovery suffered by a tenant of a determinable estate-tail will be a *fee-simple*, was admitted in *Stanhope v. Thacker* (*s*), so far as the legal effect of the common recovery was under consideration. In that case, the court of Chancery assumed, under the particular circumstances, the jurisdiction to treat the tenant in tail

(*p*) 1 Convey. p. 2.

(*q*) *Chaplin v. Chaplin*, 3 P. Wms. 229; Butler on 1 Inst. 298 a. n. 2; 3 P. Wms. 230, in *Chaplin v. Chaplin*, cites 2 Lutw. 1255.

(*r*) *Weeks v. Peach*, Lutw. 384; 1 Preston on Convey. 3.

(*s*) *Stanhope v. Thacker*, Prec. in Ch. 435.

suffering the recovery to be a trustee for those in remainder, though their legal estate was barred by the recovery; and as this case exhibits the practice of the court of Chancery in exercising a controlling power over the legal effect of a legal instrument, and thereby abridging the extent of the legal ownership acquired under the recovery, it will be relevant to the general scope of these observations to introduce this case.

In the case of *Stanhope v. Thacker*, Gilbert Thacker, on the marriage of G. T. his son, by indentures of lease and release in the year 1670, conveyed certain estates to trustees and their heirs, to the use of himself the father, for his life, remainder to Jane his wife for life, remainder to Gilbert his son for ninety-nine years, if he should so long live, remainder to trustees and their heirs during the life of his son, to support contingent remainders, remainder to the intended wife for life, for her jointure, remainder to the first and other sons of the marriage in tail male successively, remainder to the daughter and daughters of that marriage, and their heirs of their bodies, *till they should, out of the rents, issues and profits of the said premises, have raised and received the sum of 3,000 l.*; and after the sum raised, or in case there should be no such daughter or daughters, then to the heirs of the body of G. the son, with remainders over.

The marriage took effect, and the son and

his wife had issue only two daughters, who being in possession after all the preceding estates were determined, suffered a common recovery to the use of themselves and their heirs. One question in this case was, whether by this recovery the remainders were barred? and it was argued that they were barred, because the primary intention of this limitation was to make them tenants in tail; and the raising of the 3,000 *l.* was but the secondary intention thereof, and when they, being so tenants in tail, suffered a common recovery, that barred their estates-tail, and the remainders depending thereon, under the case of *Benson v. Hudson* (1 Mod. 108 to 112), and the several cases there put by Lord *Hale*. But as to this point, Lord Chancellor (*Cowper*) was clearly of opinion, both upon the first speaking to it, and the next day after, that this was but in the nature of a security for the 3,000 *l.*; and though the recovery *barred the estate-tail* and remainders at law, yet the daughters were but in the nature of trustees after the 3,000 *l.* raised for those in remainder; and that before the recovery they had but an estate-tail for their security for the sum; and that now after the recovery they had a fee-simple; but still the same in a *court of equity* was but a security till that money was raised; that those *in the remainder* had the equity of redemption in the same manner as the person who made that security would have had if no

such limitation in remainder had been ; and that therefore they might at any time, by paying off that 3,000 *l.* determine [in equity it must be understood] the estate of the daughters, and then the daughters would be but trustees for them ; and his lordship gave directions for raising the money by sale or mortgage, and for the manner of taking the account.

Though the estate taken under a common recovery suffered by tenant in tail will be a *fee-simple*, the course of descent of that estate will (t) depend on the manner in which the estate-tail was derived by the person who suffered the recovery, whether by purchase or by descent.

Taking by purchase he will have an estate descendible to his heirs generally, as an estate of indefinite quantity, and with a right of unlimited succession.

Taking by *descent* he will have an estate, which, though of indefinite quantity, and authorizing him to alien in fee-simple, will be held under a limited right of succession : admitting those heirs only to take by descent from him who are of the blood of the person to whom the estate-tail was originally limited ; and in the same manner as if that person had been the first purchaser of the fee carved out of the estate-tail (u).

These observations proceed on the assumed

(t) *Martin v. Strachan*, Willes Rep. 444.

(u) 1. Preston on Convey. p. 196, 318.

fact, that the tenant in-tail suffering the common recovery has the old use by express limitation or by implication of law, immediately under the common recovery, without the intervention of any other conveyance from a person who takes the fee under a declaration of the use of the common recovery in his favour.

The like point was decided as to copyholds, (y); and that case was professedly decided on the authority of *Martin on the dem. of Tregonwell v. Strachan* (z); that case does not appear to be an authority for the conclusion. In *Martin v. Strachan* the point expressly agitated, first in the court of King's Bench, and afterwards in the House of Lords, was, whether under a recovery suffered by a person who was tenant in tail by purchase, with reversion to himself in fee *ex parte materna*, to the use of himself in fee, the fee was descendible from him to his heirs *ex parte paterna*, or to his heirs *ex parte materna*, and in both courts it was determined that the estate did not descend to the heirs on the part of the mother.

There is nothing in the decision of *Martin v. Strachan*, in either of the courts, which established with certainty, that a preference would have been given to the heirs *ex parte materna*, though it had been a fact in the case, that the person who suffered the recovery had been tenant in-tail by descent from his mother; but

(y) *Roe on dem. Crow v. Baldwern*, 5 Term. Rep. 104.

(z) 1 Wils. 2, 66; Sh. 719; 4 Bro. Parl. C. 485.

it is reconcileable with a large class of cases which have arisen on uses, since the statute, which transferred them into possession (a).

In equity the trust followed the ownership of the land; and in Chancery, the person who would have *been heir* to the land was allowed to be heir to the *use* or trust of the land; and when uses were transferred into possession, the statute expressly provided that the estate in the land, should be held in the same plight, manner and degree, as the use was held.

On this ground, maternal heirs of a tenant in tail, taking the estate-tail by descent, and suffering a recovery, retained more equity to have the land than the heirs in the *paternal line*.

Now suppose tenant in tail to have suffered a recovery to the use of a stranger in trust for himself (the tenant in tail) and *his heirs*, then, because under the general principles by which courts of equity are influenced, the *maternal heirs* would be entitled to the benefit of the trust, to the exclusion of the paternal heirs; the principle, as stated in *Crow v. Baldwre*, in favour of the maternal heirs, is fully warranted by a long series of determined cases; and in *Martin v. Strachan*, Lord Chief Justice Lee adverted to this doctrine; and he must have relied on it as the ground on which his determination was to be founded.

(a) 27 Hen. VIII. c. 10.

His observations were, "The rule of descent is known, and will be agreed. If a man seised as heir on the side of the mother, make a feoffment in fee to the use of himself and his heirs; the use being a thing in trust and confidence, shall ensue the nature of the lands, and shall descend to the heir on the part of the mother, Co. Lit. 13 a. 3 Lev. 406. *Godbold v. Freestone*. And it will be the same, if the limitation be by *fine and recovery*; it is still the ancient use; and there is no difference whether upon the conveyance of an estate any part of the use result by implication of law; or whether it be reserved by express declaration to the party from whom the estate moved; and so is the case of *Abbot v. Burton*, Salk. 590, 11 Mod. 181" But this rule holds only where lands come by descent, and not where a person takes by purchase. And therefore if "a man have issue a son and dieth, and the wife also dieth, lands are letten for life, remainder to the heirs of the wife, the son dieth without issue; the heirs on the part of the father shall inherit, and not the heirs on the part of the mother; because it vests in the son as a purchaser (x)."

Lord *Kenyon* observed, (5 Term Rep. 108,) "The operation of a fine and a recovery on questions of this kind is extremely different. If a tenant in tail, with a reversion in fee to

(x) 1 Inst. 13 a.

himself, levy a fine, the effect of that fine on the estate-tail is to create a base fee, and that fee becomes merged in the other fee, and lets in all the encumbrances of the ancestor, which has frequently happened in practice from such a person being ill advised to levy a fine instead of suffering a recovery. Generally speaking, when two estates unite in the same person in the same right the smaller one is merged in the other, except in the case of an estate-tail and a reversion in fee, which may exist together; in such a case, by the operation of the statute *de donis*, the estate-tail is kept alive, not merged by the reversion in fee."

It may be safely stated that there is an established difference between the effect of a fine and common recovery by a person who has an estate-tail with the immediate reversion or remainder in fee.

By a fine without a common recovery it is clear that the estate-tail will be docked or barred; the privilege of the issue taken away and the estate-tail became a determinable fee, and by merger of this estate the reversion or remainder in fee will take place immediately; the reversion or remainder being the old estate will descend in the same manner as it would have done as a separate and distinct estate (e.g.) *ex parte materna* or *paterna*, according to the line through which the estate is derived, or as from the cognator in the fine, as the first purchaser when he is the first purchaser.

When a common recovery is under the same circumstances suffered, a fee-simple taken as a *feudum novum ut antiquum* is carved out of the estate-tail, and the estate thus acquired descendible to all the heirs of the person who was the first donee or purchaser of the estate-tail (a).

So far as the case of *Crow v. Baldwere* has settled the law in regard to freehold lands it is reconcilable with the learning on uses. But limitations of copyhold lands are not governed by the same rule.

Though it be true that the ultimate use in a settlement of *copyhold* lands to the settlor and his heirs is the old reversion of the copyholder, and is part of his former ownership, yet this is under the rules of the common law, and not under the doctrine of uses (b).

Now in *Crow v. Baldwere* the estate was completely changed. The entire fee became vested in the demandant in the recovery, and was re-conveyed by him to the former tenant in tail; and this case seems to fall within the range of those cases in which, as to freehold lands, it has been decided, that a feoffment by the owner, and a re-conveyance to him, will change the order of descent, since he takes back the estate under the rules of the common law, and not under the doctrine of uses.

(a) The author is not certain whether this is observation or a quotation.

(b) *Noden v. Griffith*, 4 Burr. 1252; 1 Watkins Copy. 95.

It may be conceded, that if no surrender had (in *Crow v. Baldwere*) been made by the demandant, and he had been a trustee for the vouchee in the recovery, the equitable fee would in equity have been descendible, as if the donee of the estate-tail had been the first purchaser of the fee. But it does not follow, consistently with any principle of law or equity, that the vouchee in the recovery, taking back the fee by means of a surrender from the demandant, should be in *under* his old estate. Even as to freehold lands, though the trust be transmissible through maternal heirs ; yet when the *cestui que* trust takes a conveyance from the trustee, this fee will be descendible from him as the first purchaser, without regard to the person who was the first purchaser under the original conveyance to the ancestor of the party. *Mason v. Day* (a) and *Doe dem. Hulch v. Putt* (b), fully admit this principle.

In *Crow v. Baldwere*, Lord *Kenyon*, in delivering the judgment of the court, observed, " a distinction however has been taken by the plaintiff's counsel between the operation of a common recovery respecting copyholds and freeholds. But it would lead to perplexity if different rules were applied to different sorts of estates ; copyhold estates are neither within the statute *de donis*, or that of uses ; neither indeed are they the subject of entails, unless

(a) Prec. in Cha. 319.

(b) Dougl. Rep. 771 Watk. Des. 181.

there be a custom in the manor to warrant it (which real custom was admitted in this case). It was in conformity to the rule respecting real estates, and to prevent any estate being unalienable, that the same rule was adopted in the case of copyholds; as a means of unfettering estates, and to prevent *perpetuities*. And I know of no authority which makes any distinction in this respect between copyholds and freeholds. In all other points, where the lord of the manor is not prejudiced, the same rules of descent apply equally to both. But this case has been ingeniously argued on the forms of a recovery, and it has been compared, as to the copyholds, to the case of a feoffment and re-feoffment. But this is by no means like the case of a feoffment and re-feoffment; and we cannot enter into these forms; they are perhaps inexplicable; but they must be taken as a mere mode of conveyance by a tenant in tail; and ought so to be considered in all respects; it was so considered by the court in the case of *Martin v. Strachan*. Without however wasting time in going through the doctrine laid down by Lord Chief Justice *Lee* in that case, I think we are bound to adopt the authority of it here, and to apply it to both these species of property. Therefore that part of the estate which the person who suffered the common recovery took by purchase, must go to the heir *ex parte paternâ*, and that which she took by descent

from *the maternal ancestor* to the heirs *ex parte maternâ.*"

With great deference and respect it may be observed, that in the humble judgment of the Author of this essay, this is one of the few cases in which Lord *Kenyon* seems to have been surprised into a judgment by departing from first principles; and, contrary to his intention and his general habits, to have made an anomaly by establishing in effect that which he meant to avoid; a difference between limitations of *freehold* and *copyhold* lands.

The opinions of Mr. *Fearne* and of Mr. *Butler* prior to the decision, were that the course of descent was changed. Neither of them, at least Mr. *Butler*, ever altered that opinion. This is stated with his permission.

It is a quality of an estate-tail to entitle none besides the issue or lineal descendants of the first taker, or those who stand in the same degree of relation with him, and these only when they can severally claim in successive order, under a general name of purchase, which they can all answer; as *heirs of the body* of their father, or of some other ancestor. Thus, as it has been already stated (c), a gift to a man and *his* heirs of the body of his father (d) conveys an estate in fee, and not an estate-tail; while a gift to the heirs of the body, to take as purchasers by that name, will entitle all

(c) 1 Inst. 27.

(d) 1 vol. 450.

issues in successive order, in the same manner as a gift to their ancestor and his heirs of his body (c) would have entitled them.

A few observations on the manner in which heirs of the body take under *an estate-tail* may be useful. In the first place, they take *by descent*, and not by purchase. In this respect there is a difference between *heirs in tail* and heirs taking as *special occupants*; for special occupants take by transmission; or as objects specially designated, and not strictly and properly as heirs by descent.

Although heirs of the body take by descent, it is not necessary they should be the actual heirs; one person may be the common-law heir, and another person be the heir under the entail, and different estates-tail may descend in different lines, and to different persons as heirs. And *half blood* is not any impediment to the right of an heir in tail, to take by descent, for the rule of the common law does not apply to entails. It is sufficient that he be heir, according to the form of the gift, and not necessary that he should be heir of the *whole blood* to the person last actually seised, and that is the only rule which, as to estates in fee-simple, and other estates in fee, excludes the half blood.

Even for the purposes of alienation, so as to be bound by the acts of the ancestor, the heirs in tail are bound as descendants; they do not

(c) 1 Inst. 26,

take *successive estates*, but all the heirs under an entail take one and the same estate (*f*), and many consequences of law follow from this result.

First, An alienation by a tenant in tail by lease and release is, as against the issue, voidable only, and not void, while a like alienation is, as against other persons entitled in remainder and reversion, of no effect whatever. It is actually void.

The like observation applies to leases for lives, not being discontinuances, and leases for years; and to grants, bargains and sales, and other *rightful* or innocent conveyances; and a voidable lease or conveyance may be *confirmed* by the heir in tail (*g*).

But a mere and simple confirmation or acceptance of rent will not bind successive heirs; Each heir in his turn may, unless bound by some other means, as *fine* or recovery, or effectual alienation (*h*), disaffirm the lease or other alienation.

But the statute of limitations and statute of nonclaim on fines, are allowed to operate as a bar to all the issue under the entail, if there be once a bar against the tenant in tail or the heir for the time being under the entail. However, when there are several coheirs, one or more of them may be barred as to his, her, or their share or shares; leaving the right open

(*f*) 1 Vol. 280. (*g*) *Machel v. Clerk*, 2 Lord Raym 778.

(*h*) 1 Convey. 306.

for the share or shares of the other coheir or coheirs.

The statutes of 4 Hen. 7, c. 24. and 32 Hen. 8. c. 36. which make fines with proclamations a bar to heirs in tail, have introduced many anomalies unknown to the rules of the common law, except that in some degree, they are consistent with the common-law doctrine in respect of estoppel, by fines, of general heirs. It would be an useless repetition to enumerate the various distinctions to be found in the Books by way of exposition or illustration of these statutes.

The leading cases on the subject are, *Grant's* case, 10 Rep. 50; *Duncombe v. Wingfield*, Hob. 254; *M^cWilliams's* case, Hob. 332; *Beaumont's* case, 9 Rep. 139; *Errington v. Errington*, 2 Bulstr. 42; *Baker v. Willis*, Cro. Car. 476; and the more important distinctions are collected in the chapter on Fines, in the *Treatise on Conveyancing*, p 219.

The origin of estates-tail, according to their present nature, and the qualities annexed to them at this day, are clearly deducible from the statute *de donis* (i).

The estate is denominated from the qualification annexed to the terms of the gift. The statute *de donis* requires the intention of the person who gives the estate, and is called the *donor* (while the person to whom the estate

(i) 13 Edw. 1. c. 1, called *Westm. the 2d.*

is given is called the *donee*) (*k*), to be observed according to the words in which he has expressed his intention.

This statute has a recital in these words, "Concerning lands that many times are given upon condition, that is, to wit, where any giveth his land to any man and his wife, and to the heirs begotten of the bodies of the same man and his wife, with such condition expressed, that if the same man and his wife die without heirs of their bodies between them begotten, the land so given shall revert to the giver or his heirs. In case, also, where one giveth lands in free marriage, which gift hath a condition annexed, though it be not expressed in the deed of gift, which is this, that if the husband and wife die without heirs of their bodies begotten, the land so given shall revert to the giver or his heirs. In case also, where one giveth land to another, and the heirs of his body issuing; it seemed very hard, and yet seemeth to the givers and their heirs, that their will being expressed in the gift, was not heretofore, nor yet is, observed.

In all the cases aforesaid, and after issue begotten and born between them to whom the lands were given under such condition, heretofore such feoffees had power to alien the land so given, and to disherit their issue of the land, contrary to the minds of the givers, and contrary to the form expressed in the gift. And

(*k*) Litt. s. 13.

further, when the issue of such feoffees is failing, the land so given ought to return to the giver or his heir, by form of the gift expressed in the deed, though the issue (if any were) had died : yet by the deed and feoffment of them to whom land was so given upon *condition*, the donors have heretofore been barred of their reversion, which was directly repugnant to the form of the gift ;” and, the enacting clause is in these terms, “ Wherefore our Lord the King perceiving how necessary and expedient it should be, to provide remedy in the aforesaid cases, hath ordained that the will of the giver, according to the form in the deed of gift manifestly expressed, shall be from henceforth observed ; so that they to whom the land was given under such condition shall have no power to alien the land so given, but that it shall remain unto the issue of them to whom it was given, after their death, or shall revert unto the giver, or his heirs, if issue fail (whereas there is no issue at all), or if any issue be, and fail by death, or heir of the body of such issue failing. Neither shall the second husband of any such woman, from henceforth, have anything in the land so given upon condition, after the death of his wife, by the law of England, nor the issue of the second husband and wife shall succeed in the inheritance ; but immediately after the death of the husband and wife, to whom the land was so given, it shall

come to their issue, or return unto the giver or heir, as before is said."

The entry of the statute on the Parliament Rolls is in Latin, which is pure and correct, and expresses the meaning of the legislature far more clearly than this translation, which is taken from Pickering's Edition of the Statutes, and is the same with the other editions. With a good translation the statute might be read with greater ease, and its provisions more easily understood.

This statute introduced a new estate, or rather gave to an old estate, a different quality.

This statute was considered as a *remedial law*, and interpreted with great latitude as embracing all cases which from the manifest intention of the parties, require the application of the provisions of the statute. Thus Lord Coke observes, "that the instances put by the statute are proposed only by way of *example*. And as the statute directs the intention of the person by whom the gift is made to be observed, the intention will be collected from the words of the gift in the clause of limitation; and construction will be made on the whole gift collectively." This will appear from the additional observations to be introduced into this chapter.

The object of the statute was to preserve the estate for the issue, from generation to generation, after the death of the donee, or as Lord Coke expressed it (1), "to preserve the inherit-

(1) 1 Inst. 19 a.

ance in the blood of them to whom the gift is made, and to the donor or his heir after failure of those heirs of the donee which the gift describes as inheritable to the entail."

Under an entail the heirs do not, as already observed, take strictly in that character: they take as persons of a *particular* denomination; rather as issue than as heirs. This is obvious on two grounds:

- 1st. From the consideration that they may take as particular *heirs* of the body of their ancestor, though they are not his heirs generally:
- 2dly. They may succeed to an entail, though the blood of their ancestor be corrupted by attainder, and though for other purposes, they cannot answer the description of *heirs* for want of inheritable blood.

At the same time it must not be forgotten, that successive heirs of the body are not, as has sometimes been supposed, successive takers or purchasers, at least for all purposes, though they are successive takers for some purposes.

A few distinctions will elucidate this point:

- 1st. On a grant or devise to a person and the heirs of his body, the grant or devise will fail of effect unless the grantee or devisee be living at the date of the gift; if by deed, and at the death of the testator if by will. *Hodgson v. Ambrose*, 1. Dougl. 337.
- 2dly. A grant or demise by the donee in tail,

or the tenant in tail for the time being, does, with a very few exceptions, operate as a grant or demise against himself and the heirs of the entail, although in some cases the gift may be voidable by the heirs in tail. (*Machell v. Clark*, Lord *Raymond*, *supra*.)

3dly. A lease by tenant in tail, and voidable by his issue, may be affirmed by the first series of issue, by *acceptance of rent*, or other acknowledgment of the validity of the lease; but such affirmance will not bind the *succeeding issue*; on the contrary such issue in his turn may, if the estate-tail, or the right, descend on him, affirm or avoid the lease. For this purpose successive heirs in tail have successive rights and interests.

4thly. Under the statutes of nonclaim on fines with proclamations, and under the statutes of limitation, a bar to the heir in tail for the time being will be a bar to the successive heirs under the entail; and new rights of entry will not, as has sometimes been supposed, arise to successive heirs in tail on the ground of successive rights or interests.

These distinctions will assist the reader in solving many difficulties which will occur to him in the progress of his studies.

The word heirs, in application to heirs of the body, must, as to customary lands, be un-

derstood of customary heirs (*m*). Thus, in the instances of entails of lands of borough English or Gavel-kind tenure, the order of succession to these lands on a descent thereof in fee-simple will be observed, so that in borough English-lands the youngest son, and in Gavel-kind-lands all the sons will succeed to the entail as heirs of entail; for the custom is so annexed to the land as to affect, with every estate carved out of it, the customary descent.

Estates-tail, as qualified in their limitation and extent, are of several sorts. They have different denominations according to the circumstances under which, or the persons to whom they are limited.

The division usually made of these estates is into estates-tail (*n*),

1. General.
2. Special.

This division, though it comprises all the species of estates-tail, does not distribute them under those classes, and in that order, in which they may be considered, with the greatest advantage. A more particular division will therefore be made.

Estates-tail, then, as being general or special may be arranged under the following classes:

1st. As to the extent of the degree to which the estate may descend, they are,

(*m*) *Weeks v. Carvel*, Noy, 10 b. 14 Vin. Ab. 258; Dyer, 179 Robinson Gavelkind. 94.

(*n*) Litt. s. 13. 1 Inst. 19 b.

1. General.

2. Qualified.

2dly. As to the *sex* of the persons who may succeed, they are,

1st. General, as extending to males and females of the body without exception:

2dly. Special; as admitting only one sex to the succession, and excluding the other sex.

And 3dly. As to the persons by whom or on whose body, these heirs are to be begotten, they are either,

1st. General; as to all the heirs of the body of a man or woman:

2dly. Special; as to the heirs of the body of a man or woman begotten by a particular person, or to the heirs of the two bodies of a man and woman.

On the several species of estates-tail noticed under this division it may be observed, that the same estate may, at the same time, be general in one respect; as to all the heirs of the body in whatever degree they are related; and may be special in another respect, as that these heirs shall be males, &c.

In these instances the denomination must be understood in the *sense* in which it is used. And it is clear that the same person may have several estates-tail; one in remainder after the other, as to a man and his heirs males of his

body; remainder to him and his heirs female of his body; or heirs of his body generally; or to a man and his heirs of his body by his present wife, remainder to his heirs of his body by any wife; with the restriction only that a former estate does not necessarily include *all* the issue of a subsequent remainder, as to a man and his heirs of his body generally, remainder to him and his heirs male of his body. In the excepted case, the remainder will be void, since no one can take under the second limitation without having had a previous title to the same, or a greater *extent* of interest under the former limitation.

But this rule does not extend to a new estate-tail carved out of a reversion (*m*).

From an expression of Lord *Coke* in the first part of his *Institutes*, it might be inferred that he understood a gift to a man and the heirs of his body of his father to pass an estate-tail to the son, as the donee by his proper name; and that this limitation afforded an instance of a species of an estate-tail.

A few observations will exhibit a limitation in this form in its true point of view.

The gift must be to the donee and the heirs of his own body, that he himself as the donee by name may take the estate-tail; for under a limitation to him and the heirs of the bodies of his common parents (*n*) he will not take an

(*m*) *Badger v. Lloyd*, 2 Lord Raym. 808.

(*n*) *Pybus v. Miford*, 2 Lev. 75.

estate-tail merely because he is named in the clause of gift or limitation on which the question arises, or because the words of limitation and procreation are by copulative words annexed to the gift to him; nor will a gift to a man and his heirs of the body of his father, or of his common parents, give him an estate-tail.

A limitation in this form, agreeable to the opinion of Lord *Coke* (o), passes a determinable fee; but Lord *Hale* (p), though it is apprehended without any well-founded reason, doubted of the propriety of this conclusion, and seems to have been of opinion that the limitation passed an estate-tail. The opinion of Lord *Hale* was founded on the 12 H. 4. 1, being the case of a gift to A. and *his heirs* of the body of B. his wife, who was dead; for stating the point of that case, with reference to Lord *Coke's* instance, he says, "*rationem diversitatis quære*;" and (alluding to Lord *Coke's* case) he adds, "the second son is his heir of the body of the father."

For the diversity a very satisfactory reason may be assigned.

In the case Lord *Coke* proposes, the donee has not merely an estate to him and his issue by the term heirs of the body. It extends to the issue of the body of his father; while under the gift in the time of H. 4, to which Lord *Hale* refers, no one could succeed to the estate

(o) 1 Inst. 27.

(p) Annotations on 1 Inst. 27.

unless that person was the issue of the husband begotten on the body of his deceased wife; and therefore all the heirs inheritable to the estate, were, by the form of the gift, to be the issue of the body of the husband, who was the donee (q). It is also to be observed, that the gift was not to the heirs of the husband and wife so as to make the heirs purchasers (r).

To return to the case under consideration; the gift to the donee and the limitation to the heirs of the body of his ancestor(s) will, as already has been observed, pass two distinct estates.

The donee by reason that he is named will take an estate for his own life, and, under the limitation to the heirs of the body of his ancestors, an estate-tail will vest in the person who can bring himself within that description (t).

It may so happen that the donee may be the person who answers the description; and under these circumstances he will take an estate-tail: This estate however will not vest in him merely and simply because he is named, but on the ground that he answers the description of the gift to the heirs of the body of his father. For supposing another person to be the heir of the body of the ancestor, the estate-tail will vest in that person.

On a gift in these terms it may be added,

(q) *Supra*, 1 vol. p. 450.

(r) *Supra*, 1 vol. 450.

(s) 1 Vol. p. 279. (t) 1 Inst. 24 b. 25 a. 26 b. *supra*, 1 vol. p. 279.

that though the entail may vest by purchase in any person who answers the description of the limitation, yet any other person who might have taken under the gift, in case an estate-tail had vested in the ancestor, may take under this gift, though he is not the general heir of that ancestor (t).

In *Southcot v. Stowell*, *A.* had two sons, *C.* & *D.* and covenanted to stand seised to the use of *C.* and the heirs male of his body, on *M.* his wife to be begotten, and for want of such issue to the use of the heirs male of his own body, and for want of such issue to his own right heirs for ever. *C.* the eldest son died, leaving issue one son, and several daughters. *A.* died, and then the son of *C.* died without issue male, and a question being raised how *D.* could be let into the estate under the limitation to the heirs male of the body of the father, the court held the limitation to be words of purchase, and that upon the death of *A.* the estate vested in the son of *C.* as the heir male of his body by purchase; and that on the death of the son of *C.* it descended to his uncle *D.* as the heir male of the body of *A.* *per formam doni* (u).

(t) *Southcot v. Stowell*, 2 Mod. 207; *Mandeville's case*, 1 Inst. 26 b; *Fearne*, 4th edit. p. 109; See *Hodgkinson v. Wood*; *Cro. Car.* 23; *Greswold Ca. Dyer*, 156, pl. 25. 1 Roll. Abr. 841. *Est. E.* ad contra.

(u) *Wills v. Palmer*, 5 Burr. 2615, 2 Bl. Rep. 687; *Fearne's* observations on this point in p. 58, 4 edit.

The judgment in *Hodgkinson and Wood* (x) was cited as an authority to warrant this determination, and probably ruled the decision.

That case is certainly in point, in the light in which the court considered the case of *Southcot v. Stowell*.

Beyond all doubt, however, this case of *Southcot v. Stowell* might have received the same determination, on the ground that an estate for life resulted to *A.* by implication (y) of law; and that the estate thus raised, and the limitation to the use of the heirs of the body of *A.* were, under the rule in *Shelley's* case united in him, and gave him a vested estate-tail.

The court in which the case of *Southcot v. Stowell* was determined thought differently, though this point was urged, and is now too clear to be questionable.

In the modern case of *Wills* and another v. *Palmer* (z), *A. P.* and *J. P.* his son, on the marriage of the son with *A.* settled certain lands to the use of *A.* and his heirs until the marriage, and afterwards, as to part of the lands, to the use of *J. P.* for life; and (after intermediate remainders to the use of his wife for life, and of his sons by her, or any other woman successively in tail male) to the use of the heirs males of the body of the said *A. P.* with remainders over.

A. P. being seised in fee of other lands com-

(x) *Hodgkinson v. Wood*, Cro. Car. 23.

(y) *Pybus v. Mitford*, 2 Lev. 75. *supra*, 1 Vol. p. 191.

(z) *Wills v. Palmer*, 5 Burr. 2615, 2 Bl. Rep. 687.

prised in the settlement devised the same to *W. P.* his son for life, with remainder to his sons successively in tail male, and for want of such issue to the heirs male of his the testator's body begotten, and for want of such issue to his own right heirs for ever.

At the period when the settlement was made, *J. P.* the son was the heir apparent of *A.* his father, and died before the publication of the will, leaving a daughter, who was *A.*'s heir at law when he died.

On a case from the court of Chancery for the opinion of the Judges of the King's Bench the questions were,

Whether any and what estate passed by the settlement to *H. P.* who was the second son of *A.* as heir male of *A. P.* the grantor? and whether any and what estate passed to the said *H. P.* as heir male of the body of the said *A. P.* by his will?

The Judges certified they were of opinion that *H. P.* by the settlement took by *descent* as heir male of the body of *A. P.* the grantor. That in case a third person had been the grantor they should have thought *H. P.* would have taken an estate in tail male by purchase under the description of heir male of *A. P.*

And that they were of opinion that an estate in tail male passed to *H.* as heir male of *A. P.* by his will.

The certificate of the Judges on this case, so far as relates to the limitation, by the settle-

ment, to the heirs male of the body of *A.* viz. that *H.* took by descent from *A.* was founded on the opinion that *A.* had an estate in tail-male in himself, on the ground that he took an estate of freehold by resulting use; and that the freehold did, under the rule in *Shelley's* case, attract the benefit of the limitation to his heirs male of his body.

In expressing their opinion on the limitation in the will of *A.* to his heirs male of his body, they must have proceeded on the ground that this devise operated to raise an estate in favour of his heirs male of his body as such; and that *W. P.* was the person in whom the terms of this gift were fulfilled, although a grand-daughter was the testator's general heir at law.

On the construction of these words, some additional observations will be offered when they are under consideration as words of limitation.

From these authorities it appears that an estate-tail is created not only by a gift to a man and the heirs of his body, but by a gift to the heirs of the body of a man, whether he be living or dead, provided the case is not influenced by the rule in *Shelley's* case; and as a limitation to the right heirs of a man describes by the same words the persons who are to be entitled, and the extent of the interest they are to take, a gift to the heirs of the body of a man has the like effect (*a*).

(*a*) *Mandeville's* ca. 1 Inst. 26 b.

The title under a gift in these terms is, in truth, of a compound or intermediate description, betwixt a descent and purchase.

In point of acquisition it has the quality of the latter, as not derived from or through the ancestor. In regard to its course of devolution, it is referrible to the former, as it pursues the same line and channel of transmissive succession (*b*). It is a peculiar species of entail, which, though it first attaches in the special heir according to the nature of the description, it terminates not in him and his representatives of the species denoted ; but continues its progress through the whole race of heirs described, in the same course as if it had been an estate vested in the ancestor, and descendible from him to his heirs of that description.

If in *Mandeville's* (*c*) case the gift had been to the woman and the heirs of her body begotten by her late husband, an estate in special tail would have vested in her by reason of her freehold.

Moreover, the gift may be so penned in limiting the estate to the issue as *to pass over a degree* (*d*). Thus, suppose there are grandfather, father and son, a gift to the grandfather and *his* heirs of the body of his grandson, will pass an estate-tail to the grandfather, and his wife will be dowable of that estate.

A gift in this special form excludes from the

(*b*) Fearne, 80, 6th edit. *supra*, 1 vol. 279.

(*c*) 1 Inst. 26 b.

(*d*) 1 Inst. 20.

succession, all the issue of the grandfather and father, except the heirs descending from the body of the grandson particularly named.

The persons who answer the description of the heirs of the body of the grandson must necessarily be the issue of the grandfather. The limitation, therefore, at the same time that it excludes some of the heirs of the grandfather, confines the right of succession within the compass of the issue of his body, and consequently the gift passes an estate-tail.

Let it also be observed, that the gift is to the grandfather and *his* heirs, &c. and not to the heirs of the body of the grandson.

It is the measure of the estate by *the continuance of issue* ; and its *quality* to determine only, on the general and indefinite failure of the designated issue, which give to an estate-tail its characteristics. However, there is a distinction, to be always kept in view, between estates-tail and *estates in fee determinable by executory devise, or by shifting use*, on an event connected with the failure of issue (e), as one of the circumstances which is to cause the determination, or rather defeazance or avoidance, of the estate (f).

To proceed to an examination of the nature and properties of the several estates distinguished in this division ; and

(e) *Pells v. Brown*, Cro. Jac. 590.

(f) *Watk. Princ.* 112.

First, As to *estates-tail general*, as to the extent of the degree to which they may descend (g).

A gift to a man and the heirs of his body *generally* is an estate of this description. Also a gift to a man and the heirs of his body of one sex in particular, or by a particular woman, without any restraint on the extent of the estate, is a general estate-tail in respect to the degree to which it may descend.

In another respect, it is an estate of special entail.

Under a limitation in these terms, the heirs answering that description, however remote in degree, from the person to whom the gift is made, may succeed to the estate; and the estate created by the limitation, will have continuance, as long as there is a possibility that there may be any issue to answer this description.

And, as apposite to all gifts in tail, under whatever denomination they fall, it may be observed, that, though in all human probability the donee will not have any issue, or may not have any issue of that particular description which the limitation requires, yet if there be a mere possibility that there may be such issue, the law, to give effect to the words of limitation, and to preserve the estate in point of continuance and quality, will presume that there may be issue of that description.

Thus, a gift to a man, and even a woman who is of the age of an hundred years *and upwards*, and to the heirs of his or her body, or to such man and woman and the heirs of their bodies, passes an estate-tail. Though in all human probability there will not be any issue of the donee or donees, yet because it is possible that there may be such issue, and because, according to the use of words of limitation to enlarge estates for life into estates of inheritance, no injury could be done to the donor by this supposition, the donee will have an estate of inheritance, and not a mere estate-tail after possibility of issue extinct (*h*).

So also when a gift is to a married man and his heirs of his body, by a woman, who is the wife of another man, there are two chances to one that one of the two persons of whose bodies the issue in tail are to proceed, will die in the life-time of one or the other of the remaining two persons; yet it is possible that the event may be different, and for that reason, and the reason assigned in the preceding sentence, the gift is good in the form in which it is made (*i*).

And secondly, as to *estates-tail qualified as to the degree to which they may descend*.

A gift to a man and his heirs of his body, and to one heir of the said heir only, is an example

(*h*) 1 Inst. 23 a. *Infra* on estates-tail after, &c.

(*i*) Chudleigh's case, 1 Rep. 120; 10 Rep. 50 b. 1 Inst. 25 b.

of this estate (*k*). It gives an interest to a man and some of the general or particular heirs of his body within *a certain degree*, and to them only. The gift in the case from which the example is proposed passed an estate-tail for two degrees at least.

A gift by these terms *does not*, as it is evident, pass an estate in fee. The estate is so limited that it is necessarily confined to *lineal descendants*, and gives the benefit to some of them only; and does not extend to them all.

It is equally clear that it does not give a mere estate for life. It is expressly declared to be the will of the donor that the estate shall have continuance beyond the life of the donee. The heirs are to take by *descent*, as from an ancestor, and not by *purchase*. An estate of mere freehold, it has been said, cannot continue beyond the lives of persons already born. It is now agreed that an estate for life may be limited to a person unborn, but there cannot be any limitation over in favour of his issue (*l*) as purchasers. And under a case with these circumstances, the issue cannot, for the reasons which will be assigned in a subsequent part of

(*k*) 1 Inst. 20 b. 22 a. 385 b. 39 Ass. 20; *Cotton's case* 1 Leon. 215; *Wimbish v. Tailbois*; Plowd. 39; *Trollop v. Trollop*, 8 Vin. Ab. 233, (B.) 10 Vin. Abr. 244, which cites 2 And. 138, ad contra.

(*l*) 2 Ves. jun. 357; *Adams v. Adams*, Cowp. 657; *Hay v. Coventry*, 3 Term Rep. 83; *Robinson v. Hardcastle*, *Pitt v. Jackson*, cited *infra*.

this work, take as purchasers. From this circumstance it is necessarily concluded that a limitation in this very particular manner, does at least in wills, perhaps in deeds, confer an estate-tail on the parent, to give effect to the intention of the donor ; and as it doth not extend to all the issue of the donee, but is confined to those heirs which are within a particular degree, it is, from this mode of limitation, denominated a qualified estate-tail.

By a gift by deed to a man and his heir the ancestor takes an estate for life only. The heir takes nothing, nor the ancestor by reason of the nomination of the heir. A limitation restrained so very particularly will not give an estate of *inheritance*, because there is not any possibility that the interest should continue for ever ; and it will not create any right in the person who shall be the heir of the donee, because the heir is not named to take as a *purchaser* by way of remainder, but as a *successor* to his ancestor (*k*).

Seward v. Willock (*l*) should be read in this place. That case may seem to be an authority that there may not be an estate-tail qualified in point of degree.

That too much weight may not be allowed to this objection, it should be remembered that the case from the year-books was not urged ; and that estates-tail, according to the construction they receive at this day, owe their origin to the

(*k*) *Supra*, p. 8.

(*l*) 5 East, 198, *infra*.

statute *de donis* (m), which directs the intention of the donor, when clearly expressed, to be observed; and yet it is said, no estates are within the influence of that statute, unless they were conditional fees at the common law.

It may not be irrelevant to observe in this place that a devise to a man and his heir of his body creates an estate in general tail. This is a construction in favour of the intention; and by the term heir in the singular number is understood the heir for the time being; in effect every heir in succession (n).

Thirdly, *As to estates-tail general, as to the sex of the persons who may succeed, as heirs to the entail.*

A gift to a man and his heirs of *his* body, or a single gift to a man and his heirs, *males* or *females*, of his body, and which extends the right of succession both to males and females, affords an example of this estate (o).

A limitation in this form admits both sexes to the succession, and gives continuance to the estate as long as there shall be issue of either description. These issue succeed in the same order, and under the same rules, as the heirs of a person who dies seised of an estate in fee succeed to their ancestor, with this exception, the actual seisin of a brother will not under

(m) 1 Inst. 22 a.

(n) *Clerk v. Dayes*, Cro. Eliz. 313; 10 Vin. Ab. 234; K. pl. 1, and in note; *Trollop v. Trollop*, 8 Vin. Abr. 229.

(o) Litt. s. 14. 1 Inst. 25 b. *Fitzgerald v. Leslie*, 5 Bro. P. C. 14.

the rule *possessio fratris facit sororem esse hæredem*, entitle the sister in exclusion of the brother of the half blood (p).

In the instance of a gift to a man and his heirs, males or females, of his body, the words males or females are mere words of declaration explanatory of the intention.

The like observation is applicable to a gift with the words males *and females*.

From the cases to be noticed under the next division, it will appear that there may be several estates-tail vested in the same person; one special as to males, or to females only; another to all the heirs of the body generally; or one descendible to males only; another descendible to females only, with or without an estate to the heirs of the body generally (q).

Fourthly, *As to estates-tail special, as to the sex of the persons who may succeed as heirs to the entail.*

A gift in this form admits only one sex to the succession, and excludes the other sex (r). Entails of this sort are not within the express words of the statute *de donis*; they are allowed on the equitable construction of that statute.

The different forms of limitation enumerated in the statute are given for example only; and *exempla illustrant non restringunt legem*.

A gift to a man and his heirs males of his

(p) 1 Inst. 15 b.

(q) Litt. s. 719, 1 Inst. 377 a.

(r) *Fitzgerald v. Leslie*, 5 Bro. P. C. 14; Litt. s. 21. 18 Am. 58, *Multon's case*, 1 Inst. 24 b. 25 a; 9 H. 6. 25.

body, or to a man and his heirs females of his body, is of this description (s).

In the former case all *females*, and in the latter case all *males*, are excluded from the succession.

On the construction of a gift to the use of husband and wife for their lives, remainder (t) to the heirs of the said *W. C.* (the husband) on the body of the said *S.* (the wife), lawfully begotten or to be begotten; the male to be preferred before the female, and the elder before the younger, it was determined, (so far as relates to the sons of the marriage), that estates in tail *male* were created, so that the court must have been of opinion that the male to be preferred before the female was each successive male of the family, and not the immediate children of the marriage; yet this was a very hard construction on the daughters of sons; since by this exposition of the deed they were not merely postponed to the daughters of the marriage, but were absolutely excluded from all possibility of title. It was argued, however, (without much effect on the court), that the proper construction of these words of regulation was, that the immediate sons of the marriage should be preferred to each other according to their seniority; and that they should all be preferred to the daughters; that it was not to be supposed that these words of de-

(s) *Litt. s. 21, 22.*

(t) *Denn d. Creswick v. Hobson, 5 Burr. 2699.*

claration were inserted without any meaning : and that the limitation to the heirs would of itself, without any words of explanation, have carried the entail to the sons before the daughters ; and to every elder son in preference to his younger brother.

If a gift or devise be made to A. and the *heirs male* of his body ; and if he shall die without heirs of his body then over, his estate will not be enlarged into a general entail.

It will remain an estate in tail male ; nor will he even in a will take a separate estate in tail general. The word “such” will be supplied in construction, to render the gift and limitation over consistent. The cases of this class arising under wills will be examined under the division which treats of estates-tail arising by implication.

And if a person give lands to a man to have and to hold to him and the heirs male of his body (*u*), and to him and the heirs female of his body, the estate to the heirs female is a remainder, and the daughters shall not inherit any part so long as there is issue male.

The reason assigned by Lord *Coke* is, that the estate to the heirs male is first limited, and shall be first served ; and it is as much to say, and after to the heirs female and male

(u) 1 Inst. 377 a.

in construction of law are to be first preferred (*x*).

A gift excluding the males or females would not at the common law, before the statute *de donis*, have been allowed to regulate the succession to an estate in fee-simple, though it would as to conditional fees. In one case the word *males*, and in the other case the word *females* (as a word of *limitation*), would have been rejected on the ground of repugnancy to the estate. Under the statute *de donis*, gifts in this form, made of subjects of property within the extent of that statute, are held to be unquestionably good. No doubt is now entertained on this point.

Formerly a question was made on a limitation in this form (*y*). The opinion which suggested the doubt, assumed that no limitation will give an estate-tail since the statute *de donis*, which prior to that statute would not have passed a fee conditional; and that conditional fees did not admit of a succession in the male or female line exclusively.

The special form of gifts in this class admits to the succession those issue only which answer the description of the gift. A gift to the *heirs male* of the body does not confer any right on the issue *female*; and on the other hand, a gift to the *heirs female* of the body, will remove the *heirs male* out of the line of succession (*z*).

(*x*) 1 Inst. 377 a.

(*y*) Harg. Anns. on 1 Inst. 25 a. See 5 Burr. 2615.

(*z*) Com. Dig. Ests. B. 9; 1 Inst. 246. 377 a.

In the former case the succession is conducted exactly as if there were not any *females*, and in the latter case, exactly as if there were not any *males*; and though there may be issue of the other description, no notice is taken of these issue, either to confer a title on them, or (except as to their own descendants) to preclude the title of others, or to give continuance to the estate (*a*).

The person who claims to entitle himself as an heir male under a gift to the heirs male of the body (*b*), must, through every degree, convey his descent by *males*, without the intervention of females; and in like manner the person who claims to entitle herself as an heir female, under a gift to heirs *females* of the body, must, through every degree, convey her descent by *females*, without the intervention of males; so that no male, issuing of the body of a female, or female, issuing of the body of a male, can, under a gift in this special form, deduce a title from any ancestor in an higher degree, as to a female, than her father, in a case of a gift to a man and the heirs *female* of his body; and as to a male, than his mother, in the case of a gift to a woman and the heirs *males* of her body; otherwise than through ancestors of that sex which the limitation describes.

So that when a gift is made to a man and

(*a*) Com. Dig. Est. B. 9; 2 Bl. Com. 114; 1 Leon. 188;
1 Inst. 377 a.

(*b*) 1 Inst. 24 b; 9 H. 6, 23; 11 H. 6, 13; 1 Inst. 377 a.

his heirs female of his body, and he hath issue a son, who hath issue a daughter, this daughter cannot inherit under this gift, because she cannot convey her *descent* through *females* (c).

But a male issuing from the body of a female may entitle *himself* as the heir male of the body of his mother under a gift to the mother and the heirs *male* of her body ; and in like manner a female may entitle herself, as heir female of the body of her father, under a gift to her father and the heirs female of his body ; because in these cases the father and mother take as purchasers, and they are the stocks or ancestors from which the particular and special line of heirs is to be derived.

Suppose a gift to be to a man and his heirs male of his body, with remainder to him and his heirs female of his body, and that this person hath issue of his body a son and a daughter ; on the death of the father, and by descent from him, the son will be tenant in tail male, with remainder to his sister in tail female ; and on the death of the donee each of them will have a several and distinct estate (d).

To illustrate this last case : Suppose the sister to leave a son, and the brother to leave a daughter, neither of these children can succeed under either of the limitations. The grandson cannot take as heir *male*, because he is the issue

(c) 1 Inst. 25 a. 377 ; Farington's Case, 11 H. 6, 13 ; *Johnson v. Northey*, 2 Vern. 409.

(d) 1 Inst. 25 b. 377 a ; 2 Bl. Com. 114 ; 1 Leon. 188.

of a *female*, whom he must name by way of pedigree; nor as heir *female*, because he is a male. Nor can the grand-daughter make any title to the estate in tail-male, because she is a female; nor to the estate in tail-*female*, because she is the issue of a *male*, whom she must name in her pedigree.

These observations lead to a remark on an error frequently committed in practice (e), by passing over the daughters of the *sons*, by limiting the state to the daughters of the father; giving them a preference, contrary in most cases to the intention of the parties. It may be, and, in families which have peerages and dignities descendible in the male line generally, is intended that the male line of the sons should through successive generations be preferred to any *females*. This indeed is a consequence of the prevailing wish to annex the estate to the family name or title, and support its respectability.

When this object ceases to influence the intention, the daughters of a son appear to have a sort of inherent right to be preferred before the daughters of the father, since the former take a precedence in the line of succession.

The general views of family arrangements may also be urged in their favour; still, however, it has generally happened in practice, that sufficient attention has not been paid to the situation of the daughters of sons. Looking

(e) 1 Inst. 377 a.

to the comfort of families, their habits, connexions and education, it is, with the exception of peerages, &c. infinitely more convenient to bring the daughter of a son, and through her a grandson, into the line of succession, than a more remote heir who may be without education, and with habits very little calculated to enjoy landed property of any magnitude.

The powers of alienation, by means of fines with proclamations and recoveries, do fortunately in most though not in all cases take from these irregular gifts, the consequences of the ill-judged arrangement.

Lord Coke (f) has adverted to the situation of a tenant in tail who has several estates, one descendible to males, the other descendible to females only; and he observes, "It is dangerous to use them in conveyances;" (and wills are equally within the scope of his remarks); "for great inconveniences," he adds, "may arise thereupon; for if such a tenant in tail hath issue divers sons, and they have issue divers daughters, and likewise, if tenant in tail hath issue divers daughters, and each of them hath issue sons, none of the daughters of the sons, or the sons of the daughters, shall ever inherit to either of the said estates-tail; and so it is of the issues of the issues; for that the issue inheritable must make their claim either only by males, or only by females; so as the females of the males, or males of the females,

(f) 1 Inst. 377 a.

are wholly excluded to be inheritable to either of the said estates-tail." He closes his remarks with this advice, "Where the first limitation is to the heirs males, let the limitation be for default of such issue to the heirs of the body of the donee, and then all the issues, be they females of males, or males of females, are inheritable."

There is a material difference between a gift to a man and his heirs male or heirs female or his body, under which these heirs are to take by descent, and a gift to such heirs *eo nomine* as the first purchasers of the estate-tail (*g*).

In the former case, no other issue of the donee than those which are in the first degree, can make any title under the gift, unless they can deduce their pedigree through every stage and every ancestor, by persons of that sex which the limitation describes; while in the latter case, if at any time during the continuance of any preceding estate of freehold, there should be any person, who answering the description of heirs, is the general heir of the person named in the limitation (*h*), and of that sex which the limitation describes, that person will be entitled, although, being a female, a male was her father, or, though being a male, a female was his mother, and though both descriptions shall not be fulfilled in this person at the death of the parent; for it is sufficient that the description

(*g*) 1 Inst. 25 b. *Cownden v. Clerk*, Hob. 34.

(*h*) 20 H. 6. 44.

should be fulfilled in some person at any time during the particular estate, for during all that time, the remainder is capable of effect, and only waits for some person qualified to take a vested interest under the gift.

In some cases the limitation will give the estate to the person who answers the description in all particulars, except the denomination of heir in the strict sense of that term, and although another is the heir in that sense (i).

It has been said there are authorities which go the whole length to establish the position, that under a limitation to the heirs male of the body of a person, no one may take by purchase (k) if he be not both a male issuing of the body of that person, and his general heir; nor unless it appears, as it hath done in several cases from their particular circumstances, that the word *heir* is used in the sense of issue, in description of a person already born.

The exception has always been allowed in deeds as well as wills. But since the decision of the case of *Wills and others v. Palmer* (l), it may be doubted whether this doctrine requir-

(i) *Burchett v. Durdant*, 2 Ventr. 311; *Brown v. Barkham*, Prec. in Chancery, 442; *Darbison ex dem. of Long v. Beaumont*, 1 P. W. 230; *Goodright on dem. of Brooking and White*, 2 Black. Rep. 1010; *Baker v. Wall*, Ld. Raym. 185; *Wills and Palmer*, 5 Bur. 2615; *Mandeville's Ca.* 1 Inst. 26 b; 1 Inst. 24 b, 25 a; *Farrington's Case*, 20 H. 6, 44; *Bro. Abr. Donee* 61; *Counden v. Clerk*, Hob. 29; *Harg. Annotations on 1 Inst.* 24 b.

(k) *James v. Richardson*, Ca. Abr. 214; 2 Lev. 232.

(l) 5 Burr. 2615.

ing both descriptions to be fulfilled has not been exploded; especially as far as it applies to wills. It would seem that a gift to the heirs male of the body of a person, will universally, without any regard to particular circumstances, be construed to give an estate-tail to the person, who being a male is the first of that sex in the line of succession to the person who is the stock or ancestor of these heirs, though a female may be the general heir of that person.

As under a gift to a man and the heirs *males* of his body, a male deriving his descent through a male, may take, though a *female* is the general heir of the donee, and in like manner, under a gift to a man or woman and the heirs *female* of the body of that person, a *female* being the issue of the donee will be entitled to the exclusion of the issue male, though persons of the latter description are the general heirs of the donee. The same rules apply to issue in a more *remote degree*; so that under a descent in tail-male, males are the descendants of males, and under an estate in tail-female, females are the descendants of females, through the whole course of the descent.

So also under a gift to the heirs male of the body of a man, which, first, executes in a person who unites in himself the double description of heir and male, any person who might have taken under a gift to the father and the

heirs males of his body, may entitle himself, though some other person is the general heir of the father. This point was decided in the cases of *Mandeville* (m), *Wills*, and *Palmer* (n). On these cases Mr. Fearne very judiciously observes, in his last edition of his Essay on Contingent Remainders (o): "When the words heirs male of the body, &c. operate as words of purchase; that is, when they do not attach in the ancestor, but vest in the person answering the description of such special heir, they appear to have a sort of equivocal or mixed effect. For though they give the estate to the special heir originally, and not through or from his ancestor, yet the estate which he so takes has such a reference to the ancestor, as to pursue the same course of succession in the same extent of duration or continuance, through the same persons, as if it had attached in and descended from the ancestor, &c. &c."

The consecutive passages in *Fearne*, and the passages in the rule in *Shelley's case*, *supra*, 1 vol. chap. 3, p. 279, should be read in this place for further elucidation of this topic.

In a former page it was stated that a gift to a man and his *heirs males or females* of his body is an estate-tail general, as to the sex of the persons who may succeed under the limitation to the heirs.

(m) 1 Inst. 26, b.

(n) 5 Burr. 2615.

(o) Fearne, (6 Edit.) 80.

These words, in the sense in which they are used in a gift in this form, are merely declaratory; expressing in terms that the right of succession shall be open to the heirs of both sexes. It should therefore be understood that a gift to a man and his heirs *male* of his body, by one clause of limitation, and to the same man and his heirs *female* of his body, by another clause of limitation, conveys two *distinct* estates, one in *tail-male*, the other in *tail-female*, and these estates will severally fall within the observation already offered on estates, special as to the issue inheritable under the entail, according to the sex of the issue named in each respective gift.

It rarely happens that there is any difficulty in deciding on the descendible quality of an estate-tail, but the cited case of *Den ex dem. Creswick v. Hobson* and others (*p*), involved that difficulty. The special circumstances of the limitation, collectively considered, made it clear that a general preference was to be given to males; so that no females, though in a nearer degree, were to take while there were any males, even of a more remote relation; and since no construction, except that which would give to the donee an estate in tail-male, would carry this intention into effect; it was held that he took an estate of this description.

And it may be observed, that an estate-tail being either general or special in regard to the

(*p*) 2 BL Rep. 695; 5 Burr. 2609.

person by whom the heirs are to be begotten, or from whom they are to proceed; or being general or qualified, as to the degree to which the estate may descend, may be *special*, as to the sex of the heirs entitled to succeed under the entail.

5thly, and 6thly. *As to estates-tail, general or special, as to the persons from whom the heirs are to proceed, or by whom they are to be begotten.*

A gift to a man and *his* or the heirs of *his* body conveys an estate in general tail (*p*).

A gift in this form does not impose any restriction that the heirs to succeed under the entail shall be the issue of the donee by any particular person.

The consequence is, the issue of a man by any woman; or the issue of a woman by a man, may be called to the succession.

An estate-tail special in this particular, ascertains the person by whom, or on whose body, the heirs inheritable to the entail shall be begotten: thus,

A gift to a man and his heirs of his body begotten,

1st. On the body of Emma his wife.

2dly. On the body of a deceased wife.

3dly. On the body of a person of a *particular name*; as *Mary Searle*; without specifying the person.

4thly. On the body of any person who is not

his wife, and although she be the wife of another man, and whether the donee be a single or a married man (*q*); or on the body of a person of particular rank; as a person of the degree of peerage; or on the body of a person being a protestant, &c. &c. or a person who shall have a given portion, as 10,000*l*.

5thly. On the body of his first wife (*r*), or on the bodies of two women by name.

And also a gift to a man and woman who are married, or may lawfully intermarry, and their heirs of their bodies, conveys an estate in special tail.

In all these instances there is a *specification* of two bodies from which the heirs to be entitled by the form of the gift are to proceed, or of the persons by or on whom these heirs are to be begotten; and from this specification of two persons, limitations of this and of the like sort, are deemed special entails; and the right of succession is open to those issues only who can bring themselves within the particular terms of the gift.

An ordinary general entail must in terms or in effect, designate the heir as proceeding from the body of one person.

An entail, being special under this arrangement, necessarily designates two or more persons as the stocks or bodies from which the

(*q*) 1 Rep. 120, Chudleigh's Case, 10 Rep. 50 b. 1 Inst. 20 b.

(*r*) 1 Inst. 20 b; 12 H. 4. 2.

heirs are to proceed ; or persons by whom the heirs are to be begotten.

Under a gift to a man and his heirs of his body, begotten on the body of Emma his wife, no issue besides those which are begotten by the donee on the body of this identical woman, can succeed to the entail.

A gift in this form supposes the donee to have a wife of that name at the time when the gift is made ; otherwise the entail would fail.

Also, under a gift to a man and his heirs of his body *by a deceased wife*, the donee will be the tenant in tail, supposing any issue of his marriage with that woman are in existence at the date of the gift (*r*).

When there are not any issue of their marriage at that time, the donee will be merely tenant for his life, and not tenant in tail after possibility of issue extinct. For it is impossible at the time of the gift that there shall be any heirs to succeed to the estate under the special form in which the gift is made ; and it follows, as a necessary consequence, that the estate must determine with the life of the donee.

And it has been held that after a divorce of two persons, (and it must be understood *a vinculo matrimonii*,) to whom a gift in special tail was made while they were husband and

(*r*) 12 H. 4, 1 ; 1 Inst. 27 b, *note*.

wife, these persons shall be tenants for their lives only (s).

But assume that at the time when the gift is made there are any issue under the entail, and there is a failure of these issue afterwards and in the life-time of the donee, the donee will, so long as there is a continuance of issue inheritable under the terms of the gift, be tenant in tail and on failure of such issue become tenant in tail after possibility of issue extinct.

In *Page v. Hayward* (t), N. S. devised lands to his niece M. B., and the heirs male of her body, upon condition and provided she intermarried, and had issue male by a person surnamed *Searle*, and in default of both these conditions he devised the same lands for several estates in remainder; and it was held, that the estate devised to *Mary* was a good estate in special tail; that is, to her and the heirs male of her body begotten by a *Searle*; and that the words *upon condition*, &c. though words of express condition, should be taken to be words of limitation.

Under a gift in this form, the issue begotten on the body of the donee by any person of the name expressed in the limitation, will be entitled, whether their father was born before or after the gift was made.

Some cases have raised the question whether

(s) 4 Vin. Ab. 205, pl. 1; Broke Tail and Dones, pl. 9; Broke Deraignment, pl. 15.

(t) *Page v. Hayward*, 2 Salk. 370; 1 Lev. 35; 2 Siderf. 102.

the husband must not have his name by origin and birth (*u*).

In the case under consideration the gift specified the person by whom the issue should be begotten, by prescribing merely that he should be of a particular name, and not that he should be a person in certain, as *John Searle* of *Ashburton*. And it was resolved, that the estate-tail of *Mary* did not cease by her marriage with a person whose name was not *Searle*, because she might possibly survive her first husband, and afterwards marry a person of the given name.

The gift might have prescribed, but did not prescribe, that this person should be her first husband.

In those instances in which the gift specifies the person by whom the heirs to the entail are to be begotten; or from whose body they are to proceed, by describing that person by name; as *J. S. of A.*; those issue only which are begotten by or proceed from the body of that particular person, can inherit the estate.

It will not be sufficient that they are begotten by or proceed from the body of a person of that name. In one case a particular person is described by his name; in the other case no person in particular, is described. Unless there be reference to an individual, to describe him by a name by which he may be distinguished from others of the same name, the gift, it

(*u*) *Pyot v. Pyot*, 1 Ves. sen. 336.

should seem merely requires that he shall be of the name which the gift expresses.

When a gift is made to a man and his heirs of his body *by a woman who is not his wife*, then, in order that an estate-tail may be created by the words of the gift, it must be understood as invariably and universally true, and a rule equally applying to all the other cases under this class, that these persons *may lawfully intermarry*. In those instances in which there is any impediment to the marriage, of the parties, by reason of consanguinity, affinity, sentence of divorce in the Ecclesiastical Court *a vinculo matrimonii* standing unreversed, or any other sentence which declares a marriage between the parties to be improper, the law will presume that there will not be any lawful issue from these two persons, and for that reason will not allow the donee to take an estate-tail.

The estate in point of time cannot have continuance under the limitation, beyond the life of the donee, for want of persons to take it in succession from him; and it will be bounded by that period, and be denominated from its extent.

On this point it may be proper to observe that in Anderson's account of *Chudleigh's* case (y), it is reported, that if land be given to one and his heirs of the body of his sister lawfully begotten, this is an estate in *fee-simple*, because

(x) 1 Inst. 25 b.

(y) *Dillon v. Frain*, 1 And. 310.

it is impossible that the brother should, consistently with the law for the regulation of marriages, have issue of the body of his sister to inherit this land, by reason of the limitation; and for this additional reason, when the limitation is to him and the [it should be *his*] heirs of the body of his sister, these words 'of the body of his sister' are altogether void, and the words 'his heirs' make an estate in fee.

On these positions, a doubt arises, whether under a gift to a man and his heirs of the body of a *deceased wife*, when there is not at the date of the gift, any issue of such wife, the donee shall have an estate for life or in fee.

It is clear that there cannot be any heirs to inherit under the entail.

Reasons may be urged on either side of the question, and the reader will therefore act prudently to suspend his judgment, and treat the case as open to doubt till the point shall be resolved by an adjudication.

The circumstance of the existence of another marriage of each, or of either of the persons from whose bodies the issues described in the limitation to be inheritable to the entail, are to proceed, is, as it has been already observed (z), no objection to the validity of a gift to the heirs of the body of one of them by the other.

In all human probability there will not be any lawful issue of the bodies of these two persons.

(z) Chudleigh's Case, 1 Rep. 120; 1 Inst. 20 b.

It is possible, that there may, under subsequent events, and by marriages, be issue to take under the terms of the gift; and that possibility will afford scope and operation to the gift, and entitle the donee to be deemed tenant of an estate-tail.

A devise was made by a man to his *wife* and the heirs of her body by him, and he died, leaving no issue, and the wife not being enseint, and it was decided by the court of King's Bench, that the possibility that there might have been issue, entitled the wife to be tenant in tail after possibility of issue extinct (a).

In support of the estate-tail it is urged, that in intendment of law, it is impossible at the death of the husband to try the fact whether there would or would not be any issue; and the possibility in law that the wife might have issue of her deceased husband, makes her tenant in tail for a time. Thus Mr. Justice *Bayley* observed, "A possibility" [of issue] "existed for a time, and that is the thing to look to, and not to the event;" and the observation of Mr. Justice *Dampier* (b) was, "For nine months after the testator's death there was a possibility of her having issue of the body of her husband. At the time of his death, she might not have ascertained the fact; she might not have been one month gone; there was a possibility therefore during the whole

(a) *Platt and Wife v. Powles*, 2 Maule & Selwyn, 65.

(b) S. C. 68.

period of gestation, that she might have issue, and the event cannot vary it. It is the possibility, and not the probability, to which the law looks; and here the possibility was not at all more remote than that which exists between parties of an age passed child-bearing."

When a gift is to a man and his heirs of his body *by his first wife*, those issue only which proceed from the body of that wife can claim to be entitled to the estate.

Suppose the donee to intermarry with several women, and to have issue by each of them, the issue of neither of them, except of the one whom he shall first marry, are within the extent of the gift.

A gift to a man and his heirs of his body to be begotten *on the bodies of two women (c)*, is also a good limitation in special tail. Under a gift in these terms no one can succeed to the estate unless he is the issue of the body of the donee, proceeding from the body of one or the other of these women.

These issue will succeed, as to males, according to the priority of their *births*, with a preference to the males of the woman who shall be last taken to wife, as against the daughters by the first wife; and as to females, daughters of both women will succeed together, as coparceners, and on failure of issue of any of the daughters, being heirs under the entail, their parts will devolve to the survivors, or those who

(c) 1 Inst. 25. b. 184.

represent them, without any distinction whether they are the issue by one or the other woman. Half blood will not be any impediment to a succession of one of these persons to the other. This indeed is clear, from the observations already made, and from the language of Lord Coke (d), who saith, "Half blood is not respected in tail, because that the issues do claim in descent *per formam doni*, and the issue in tail is ever of the whole blood to the donee." And Lord Kenyon observed in the case of *Doe v. Wichelo* (e); "In the case of estates-tail, the half blood coming within the description of the entail may inherit as effectually as the whole blood." There the rule of *possessio fratris* does not apply.

The difference between a gift of the last form, and a gift to a *man and two women, and their heirs of their bodies*, will be stated in a subsequent part of this chapter.

A gift to a *man and his heirs begotten by his son* (f), exhibits another instance of an estate-tail, special as to the person from whom the issue inheritable to the estates are to proceed.

A gift in these words entitles the father to an estate-tail, and his wife will be dowable of this estate as an inheritance in him.

The circumstance on account of which it was thought proper to introduce an instance of a gift in this form, as a special entail, and which indeed gives it a distinguishing feature, is, that

(d) 1 Inst. 15 b. (e) 8 T. Rep. 213.

(f) 1 Inst. 20 b. Markham's Case, 12 H. 4, 2.

the son, from whose body the issue are to proceed, and all the other children of the donee, and the respective issues of all these children, are excluded from the succession : and the right of succession is open to those issue only of the father which proceed from the body of his son.

A gift to a man, whether single or married, and to a woman *not his wife*, whether single or married, and their heirs of their two bodies between them lawfully begotten, is another instance of an estate in special tail (g).

In this instance the limitation is appropriated so strictly to the issue of the two bodies, that no issue, besides those which proceed from a marriage between the donees, can possibly succeed to the estate under the terms of the gift.

A gift of this sort conveys the freehold and inheritance *to the donees jointly* ; and either of them, as well as any other joint-tenant, may sever the joint-tenancy, and after severance, each person will have a several estate in special tail in his or her particular share ; the man to himself, and the heirs of the bodies of himself and the woman ; and the woman to herself, and the heirs of the bodies of herself and the man.

In neither case, it should seem, is the entail general ; viz. to the man or the woman, and the heirs of his or her body only : but is a special tail.

(g) Litt. s. 16, Chudleigh's Case, 1 Rep. 120.

A fine with proclamations by one of the ancestors would, in all probability, bar the heirs as to the moiety of the other by reason of privity, and the original gift (*h*) to the heirs of their bodies.

This is evidently the rule when the gift is to husband and wife as tenants by entireties; for under the statute of proclamations of fines, the fine of one of these persons will be a bar to the issue of the other of them; so far that he cannot claim under the entail.

This seems to be a necessary conclusion from the cases of Sir *George Brown* and *Beaumont* (*i*), when husband and wife are seised by entireties; but though the husband levies a fine with proclamations, and this fine is an effectual bar to the issue of him and his wife, still his wife, when she enters, or brings an action and restores herself to her estate, will be tenant in tail to every purpose, except that of transmitting the estate to her issue *as the issue in tail*; yet when they are joint-tenants, either may, as to his or her own share, alien and bar the other.

When a gift is made to a man, and a woman not his wife, and *their heirs of their bodies to be begotten between them*, and the jointure is suspended or severed, without being barred by a fine with proclamations, and a marriage takes place between the donees, and

(*h*) *Beaumont's Case*, 9 Rep. 139; *Duncombe and Wingfield*, Hob. 254; *Baker v. Willis*, Cro. Car. 476.

(*i*) *Beaumont's Case*, 9 Rep. 139; *Baker v. Willis*, Cro. Ch. 476.

one of them dies during the suspension or severance of the jointure, clearly, in the case now under consideration, the issue of this marriage may bring themselves within the terms of the gift to the heirs of the body of the deceased parent by the surviving parent, and may, notwithstanding the subsistence of the life of the surviving parent, entitle themselves to the moiety of the deceased parent. These issue are the heirs of the deceased parent by the surviving parent, and this is all that is necessary, for nothing more is required than that the issue claiming under a limitation in this form should proceed from the bodies of both the persons named in the gift.

After severance the donees have not a joint estate in the inheritance; and though the same person, as claiming to be heir of the bodies of both the man and the woman, may entitle himself to the entirety of the tenement, yet in truth, when there is a severance of the jointure, he becomes entitled to the *entirety*, by *moieties*; and takes one undivided moiety by descent from his *father*, as the heir of his body by the mother; and the other undivided moiety by descent from his mother, as the heir of her body by his father.

In this particular, there is a difference between a gift to a man and a woman not being husband and wife, and the heirs of their bodies, and a gift to a man and his wife, and their heirs of their bodies. When the donees are not

husband and wife, the man and the woman have the inheritance even in the first instance jointly, and they will continue to hold the same in that manner till the tenancy shall be severed.

After severance the donees will be tenants *in common* of their respective parts, and hold the tenement *by moieties*; and the issue succeeding to the entails will take the several moieties as the heirs of their respective parents.

As often as the husband and wife are donees under a gift to them during the coverture, they take by entirety, and the issue must be and accordingly claim, as the heirs of both their parents (*k*).

As often as a gift is made to a man and to a woman, who may *lawfully intermarry*, and their heirs of their bodies to be lawfully begotten, the donees will be tenants in *special tail*, although the words of the limitation do not, in precise terms, direct those heirs to be begotten between them (*l*).

On the other hand, when a man and a woman taking under a gift in this form, may not *lawfully intermarry*, they, as to the inheritance, will severally be tenants of their respective moieties in general tail; and they will be joint-tenants of the freehold (*m*).

Probably a difference may be taken, exem-

(*k*) Beaumont's Ca. 9 Rep. 139, 1 vol. p. 131.

(*l*) Hob. 3; Sir Nicholas Carew's Case, Dyer, 332 b.

(*m*) Huntley's Case, Dyer 326; Bendl. 226; 1 Inst. 25. b.

plified by the instance on the one hand of a gift to persons who may not lawfully intermarry, and appropriating the heirs inheritable to the entail to be begotten of the bodies of the donees between them; and on the other hand a gift to the same persons, leaving the intention of the donor to the construction of law; thus, if in the instance before adduced, of a limitation to a man and his heirs of the body of *his sister*, the words "of the body of his sister" were altogether *void*, and a fee-simple passed, why, in this instance, are not the words "between them" to be repugnant, and an estate in general tail to arise?

Perhaps it would be better that an estate for life only should pass in both instances.

In the first instance, the gift expressly limits that the heirs to inherit under the entail shall proceed from the bodies of these two persons, so that under the terms of procreation, no issue can claim to be heirs of entail unless they are begotten by or proceed from the body of one of the donees, by or on the body of the other of them; and to give the donees an estate in general tail would be to extend the gift against the express intention of the parties; consequently the donees will take an estate merely of freehold.

In the latter case, the words of limitation are at large, and leave the intention to the construction of law; and the courts will not deem any words to be useless when by a rea-

sonable interpretation they may have effect; and they will not conclude that it was the meaning of the parties, that the donees should intermarry, when the law would account a marriage between them to be unlawful and voidable, and therefore, as to the inheritance, the donees may, without any violation of the intention of the donor, have the tenement by moieties, and be tenants in general tail of their respective parts.

It is also said, that when a gift is to a man and to two women, and the heirs of their bodies (*n*), or to two women and one man, and the heirs of *their* bodies, the donees will have several inheritances (*o*).

The reason Lord *Coke* (*p*) has assigned for this opinion, is, that the donees cannot have one issue of their bodies, and that there shall not, by any construction, be a *possibility upon a possibility*, viz. that the donees shall intermarry.

To this reason, Lord *Hale* (*q*) adds, 'That it cannot be tail, for the uncertainty which of the women the man shall first marry.'

From these positions it may be inferred that the donees severally have estates in general tail.

Whether this is a correct inference does not clearly appear. It may be understood that they have several estates of inheritance; the

(*n*) 1 Inst. 25 b.

(*p*) 1 Inst. 25 b.

(*o*) 1 Inst. 25. b.

(*q*) *Ann.* on 1 Inst. 25 b

man to himself and to the heirs of his body to be begotten on the bodies of the two women ; and the women to themselves respectively, and their heirs of their respective bodies to be begotten by the man.

This is the construction most agreeable to the rules which, generally speaking, are observed in expounding deeds ; and will, in all probability, be found most consonant to the intention of the parties.

According to this interpretation, the point of law expressed by Lord *Coke's* proposition is, that the donees take the inheritance severally, and not jointly ; and not that the issue of the donees generally, without any reference to the person by whom or on whose body they are to be begotten, shall succeed to the entail.

Suppose the point of law, expressed by the opinion of Lord *Coke*, to be, that the donees severally take estates of inheritance in general tail ; even in that case it may be questioned whether the circumstances under which the gifts are framed, did not induce the decision, if any, which was pronounced on this case. It is not specified that the issue inheritable to the entail are to be begotten between the donees ; and the law, probably, will not presume that it was the intention of the donor to confine the gift to the issue of the man and the two women jointly.

A presumption of this sort can be grounded only on a foreign intendment.

From the words of the gift, it does not appear that the marriage of the donees was in the contemplation of the donor, and, therefore, in legal estimation, the gift may pass estates of inheritances in general tail. By a different construction, the law must abridge the estate of the donees.

To do this it must also raise a presumption on a presumption; and must suppose that one of the donees is first to marry another of them, then to survive and marry the third. This may be carrying presumptions too far. The scope of the observations made by Lord *Coke* and Lord *Hale* on the gift under consideration, as expressed by this deduction, admit that their observations are confined to the mere point of law on presumptions; and, with this restriction, they may be well founded; and then it may be suggested, that there is a difference between a gift which is general, and leaves the intention to the construction of law; and a gift which expressly appropriates the heirs to be of the bodies of the donees, and directs these heirs to be begotten between them.

By supposing the donees to have the freehold jointly, and each of them to have a several inheritance in a third part, the husband to himself, and his heirs which he shall beget on the bodies of the two women in successive order, and with priority of males, as is already observed with reference to a gift to a man and

his heirs by two women; and each of the women to have a several inheritance in a third part, to her and her heirs of her body to be begotten by the man; and so *vice versa*, when a gift is made to two women and a man and their heirs of their bodies between them lawfully to be begotten; the evident intention of the parties is complied with, and no rule of law by any means violated. Indeed, consistency is given to the law in reference to the intention; and, as it may very well stand, at least with the general, if not with the *particular*, intention of the parties, that a gift in these terms shall receive this construction, it may be worth the experiment to try the question whenever a title may depend on it. The only objections to be offered against this construction are as they are assigned by Lord *Coke* and Lord *Hale*, upon the ground, as to one of them, that there is a possibility upon a possibility; as to the other of them, that it is not certain to whom the land shall descend.

Lord *Coke's* objection is answered by the cases which determine a gift to a man and his heirs of his body by two women to be a good entail; and Lord *Hale's* objection is obviated by the mode in which lands comprised in a gift in the last-mentioned form are to descend.

From these deductions the conclusion is that the different penning of different gifts may call for a different construction.

When a gift is made to two men, or to two

women, or to a man and a woman who may not lawfully intermarry, and their heirs of their bodies (*r*), the donees will have the freehold jointly, and the inheritance severally; so that they will be joint-tenants for their lives with several inheritances; and unless the tenancy be severed in the lifetime of the donees, the survivor will hold the entire tenement during his life, and after his decease the several issues of himself and his companion, will succeed to the several shares of their respective parents; and in the mean time, after the death of one of them till the decease of the other, the issue of the deceased tenant will have a vested interest in the nature of a remainder.

The parents in their lifetime have the freehold as one estate only, and each has the inheritance in his or her share as a distinct estate.

Under a gift to two men and their wives, and their heirs of their bodies to be begotten between them (*s*), each class of the husbands and wives will have a distinct moiety of the inheritance as tenants of entireties of this moiety in special tail, without any cross-remainders. Lord *Coke's* observation is, "They shall take a joint estate for life, and several inheritances, viz. the one husband and his wife the one moiety, and the other husband and his wife the

(*r*) *Wilkinson v. Spearman*, cited in *Cook*, 2 Vern. 545; and *Cray v. Willis*, 2 P. Wms. 529; 1 Inst. 102.

(*s*) 1 Inst. 25 b.

other moiety, and no cross-remainder or other possibility shall be allowed by law where it is once settled and takes effect."

The last example is widely different from those which have been considered. The words of appropriation are fully satisfied, by the construction they receive, when they are applied to each of the couples distinctly.

The observations already offered on a gift to a man and his heirs *of his body* by a woman, namely, that the parties may lawfully intermarry, is equally apposite to a gift to a man and woman, who are not husband and wife; as a son and his mother; a brother and his sister, and their heirs of their two bodies (*t*).

When the parties are within the Levitical degrees, or there is any other impediment to their future marriage, each will have a several inheritance in his or her share to him or her, and the general heirs of his or her body. But though under a gift to a man and woman who are not husband and wife, and may not lawfully intermarry, and their heirs of their bodies between them, each will have a several estate of inheritance, subject to a joint freehold in both; and although under a gift to two men, or to two women, and their heirs of their bodies (*u*), they will be joint-tenants of the freehold, and each of them will have a several estate-tail in a moiety.

Yet it must be remembered (*x*), that when

(*t*) 1 Inst. 25 b.

(*u*) 1 Inst. 182, 184.

a gift is to two persons as tenants in common for life, with a subsequent limitation to their heirs of their bodies as tenants in common, each will have an immediate estate-tail in a moiety.

When a gift is to a man and a woman who are husband and wife, and their heirs of their bodies, though these persons ought not to have married by reason of consanguinity or affinity, and though their marriage may be annulled by suit in the Ecclesiastical Court, yet, till the marriage shall be avoided, they will have an estate in special tail, and by entireties.

Suppose either of them should die before a sentence, declaring the marriage to be void, shall be pronounced, the issue proceeding from the marriage may inherit under the gift (y).

After a divorce of the parties, either for the reasons already assigned, *i. e.* a divorce *a vinculo matrimonii*, they will be merely tenants for life. By the divorce they are separated, and their marriage is declared to have been null and void from the beginning; for reasons which existed prior to the marriage, and will be an impediment to any future contract of marriage between them.

It has been asserted by Lord Coke (z) that if lands be given to a man and woman in special tail, and they are divorced *causa præcontractus*, both shall hold the lands for their lives.

(y) 1 Thomas Co. Litt. 126.

(z) 1 Inst. 22 a; 10 Rep. 139.

The only case cited by Lord Coke in support of his position is, 7 H. IV. 16, and that case, as far as it goes, supports his doctrine, but it was a mere *dictum* by *Thirning*.

The language of *Thirning* is, "By their divorce, their estate shall be *amenuis* [reduced], and turned into a freehold."

The best reason, in support of the doctrine, is, that the gift was to the man and woman, and the heirs of their bodies; and in effect of their marriage; and shall not be varied by the divorce, so as to make heirs of a different class and order inheritable.

A few useful observations on the validity of marriages, and on the different effects of the several sentences of divorce, may be added in this place.

A diversity exists between marriages which are absolutely a nullity, and marriages which are not merely void, but may be avoided by suit and sentence; and between marriages declared void for an impediment to the legality of the marriage of the parties, as between themselves, by reason of consanguinity, affinity, &c. and marriages declared void because they were not celebrated with the proper ceremonies.

The distinctions are,

- 1st. When the marriage is declared to be void, for some reason which existed at the time of the marriage, and cannot be removed; as consanguinity, &c. (in which case there is an equal impediment

to a future marriage of the parties; and consequently, in supposition of law, there will not be any issue of their two bodies, nor indeed any marriage between them), they cannot be tenants in tail.

2dly. When the marriage is declared void because the proper ceremonies were not observed; or because the parties were not married at a proper time, or because one of them was previously married to another person; in all these instances the reason of the sentence may be obviated by matter *ex post facto*, and a marriage may be had at some subsequent period, and there may be lawful issue of the second marriage; and for this reason, the parties may be tenants in special tail.

Also a gift to a man and his wife and their heirs of their bodies (*a*) passes an estate in special tail. The limitation is so far special that no persons can succeed to the estate besides those which proceed from the bodies of the two donees, and are the issue of their marriage, either in an immediate or remote degree (*b*); and a gift to a man, and a woman being his wife, is peculiarly special, owing to the unity of their persons by marriage, and the consequent entirety of their tenancy.

And in this case the husband and wife are

(*a*) Litt. s. 16.

(*b*) Shep. T. 24.

not tenants in common, or joint-tenants; they have the entirety as one individual, because the gift is to them jointly after marriage; and there is a maxim in law, deducible from Scripture, that husband and wife are as one person, by the unity arising from their marriage (*a*).

A gift to two men and their wives, and their heirs of their bodies to be lawfully begotten between them, pass several estates in special tail.

On this point some observations have been already made. According to Lord *Coke*, each husband and wife has the inheritance of a moiety to themselves, and to their heirs of their bodies to be lawfully begotten between them. The four, as between themselves, are not seised in the quality of joint-tenants. Each husband and wife, as to the freehold and inheritance, has an undivided moiety by entireties, as their particular share (*b*).

The words of appropriation are fully answered by this distributive construction (*c*).

It is morally impossible that a gift in this form should have any effect as to the inheritance, if it were to receive a construction which would exclude all persons from the succession, unless they were the issue of the bodies of more than two of the donees. For two persons must die before there can be any future

(*a*) 1 Vol. p. 131. Wingate's Maxims, 208.

(*b*) See 1 Inst. 25 b, and query, Jointenancy in the *four*.

(*c*) Justice Windham's Case, 5 Rep. 7.

marriage between the parties, and to require a second marriage between them is to expect that the wife of one of the husbands, and the husband of the other wife, or *vice versa* should die in the life-time of the other two donees, and that the survivors should intermarry. This truly is a reference to a *possibility on a possibility*. The law will not look so far; especially as all the words of the gift have some effect by the construction they receive, when they are held to operate in the manner which has been stated (b).

A stronger and more powerful reason is, that in the nature of things, no issue can proceed from more than two persons, *i. e.* ancestors or parents; one male and one female: and infinite confusion and uncertainty would arise from allowing such a gift to intermix in the succession of heirs derivable from successive marriages, of each of the males or females.

It remains to be noticed, that it is a general rule, that when a gift is to two or more persons and their heirs of their bodies, and these persons *may not lawfully intermarry* (c), the several persons take an estate of freehold in joint-tenancy, which, unless there be a severance of the jointure, will survive from one to the other, till the decease of the survivor of them, and yet they have several inheritances; so that after the decease of each joint-tenant, the inheritance will, as to the share of that person.

(b) 1 Inst. 25 b.

(c) Litt. s. 282.

devolve to the issue of that person, subject to the right of survivorship in the other joint-tenants during their lives.

On gifts in tail to husband and wife during coverture, there are some important distinctions, arising from the terms of the gift, and the construction of these terms.

When the husband and wife are joint-tenants by express limitation for their lives, with an immediate limitation to the heirs of their bodies, they have an estate-tail in possession, because both limitations are of the same quality (*d*).

On the other hand, when by one clause of limitation, the husband is tenant for his life, with a remainder by another clause of limitation to the wife for her life, with remainder to the heirs of the bodies of the husband and wife by a third clause of limitation, the husband and wife have, each, a several and distinct estate; and they both, jointly, or rather by *entireties*, have an estate-tail separate and distinct from the estates for life, because the limitations to the husband and wife separately for their *lives*, and the gift to the heirs of their joint bodies, are of a different quality; for the limitations to the husband and wife are several and distinct, and the limitation to the heirs of their bodies is joint or entire.

The tendency of these observations is merely

(*d*) *Roe v. Aistrop*, 2 Bl. Rep. 320, 335, 1228; *Fearne*, 6th Edit. 37, 64. 1 vol. p. 320, 335, 340.

to show under what circumstances the husband and wife have an estate-tail in possession; and under what circumstances they have estates for life, with a remainder to them in tail, so that they have a future and not a present estate of inheritance. The knowledge of this point, with a view to cases which are in the occurrence of every day's practice, is of the highest importance (e).

Again, when a gift is to husband and wife jointly for their lives, or to each of them distinctly for life, with intervening remainders to their children, with remainder to the heirs of the bodies of the husband and wife (f), the husband and wife have an estate-tail, distinct from their estate for life, and expectant on their estates, and on the several intervening remainders. But when all the intervening limitations give contingent interests, and in that case, only until these interests or some of them, become vested, the estate-tail will execute in the baron and feme *sub modo*, provided the freehold is limited to them as one entire indivisible estate, so that they may have an estate-tail in possession. As soon as any of the contingent interests become vested estates, the several limitations to the ancestors and their issue will give separate and distinct estates,

(e) 1 Vol. p. 340.

(f) Lewis Bowles's Case, 11 Rep. 80; Fearne 6th Edit. 37, 223.

and they will become tenants for life with remainders expectant on the intermediate estate in tail. For this purpose the estates open or separate to admit the remainders.

As often as the husband and wife have distinct estates for their *respective lives* it is impossible that their estate-tail should fall into possession during their joint lives. While both are living, the estate-tail will remain a future vested remainder; and, for the reason already assigned, will not, in any event, and in reference to the intervening estates, consolidate with the estates for life limited to the husband and wife (*g*). After the death of the husband or of the wife, and the determination of the intermediate estates, the estate-tail may execute into possession by merging the estate for life of the survivor of the husband and wife (*h*).

In those instances in which the husband and wife have a joint estate for their lives, with a remainder to their heirs of their bodies expectant on one or more intervening estates, the estate-tail will execute into possession on the determination of the intervening estates, although the husband and wife are both living at that time, because the nature and quality of both estates is the same; for they are jointly seised of one, as well as the other estate.

When, in reference to each other, the husband or wife is alone made tenant for life, and,

(*g*) 3 Convey, (on *Merger*.)

(*h*) Fearn, 6th Edit. 64. 3 Convey. (on *Merger*.)

afterwards in the same deed or will, there is a limitation, by the same or a distinct clause, to the heirs of the body of the husband and wife, the husband and wife will not have an estate-tail.

The gift to the heirs (*i*) entitles the persons who on the death of the husband and wife shall answer this description, and these persons will take originally in their own right as purchasers.

In the mean time, till the death of the survivor of the husband and wife, the limitation to the heirs will pass a contingent remainder for want of the existence of a person in whom the description of heirs of the bodies of the husband and wife may be fulfilled (*k*).

Under the rule *nemo est hæres viventis*, that description cannot be fulfilled in any person during the life-time, either of the husband or wife.

When the gift is (*l*) to heirs general or special of the body or bodies, in remainder of an estate or estates for life to the person or several persons to whose heirs the gift is made, the nomination of the heirs merely ascertains the duration of the estate of the ancestor, or of the several ancestors, and the heirs are to take in succession by descent, and not in their own right, or by purchase.

(*i*) *Lane v. Pannel*, 1 Rol. Rep. 438; *Frogmorton v. Wharrey*, 3 Wils. 125, 144; 2 Bl. Rep. 728; *Dyer*, 99 a. b. *Denn v. Gillot*, 2 T. Rep. 431.

(*k*) 1 Fearn, 6.

(*l*) 1 Vol. p. 273.

The case is widely different when either a husband or wife singly has an estate for life, and the subsequent limitation is to their heirs of their bodies; inasmuch as the persons who are to take under the second gift, are to stand in the united relation of heirs to the husband and wife, and no estate of freehold is limited to one of them so as to bring the rule in *Shelley's* case into operation (*m*).

On the difference of construction exhibited by the several cases, the conclusion is, that though every person may so far be supposed to carry his own heirs, &c. (*n*) in himself during his life, as that a limitation to them, where he takes a preceding freehold, may vest in himself; yet no person can be supposed to include in himself the heirs, &c. of himself and of some other person; and hence the decisions, that if the gifts to the parent or ancestor fail either by lapse in the life-time of a testator, or by any other means, the heirs of the body cannot take in their own right, since there was not any gift to the heirs as purchasers.

But when the heirs of the body are to take by way of *purchase* (*o*), and in their own right, the death of the ancestors, in the life-time of a testator, will not disappoint the gift to the heirs of the body.

(*m*) *Lane v. Pannel*, 1 Roll. Rep. 438. *Frogmorton v. Wharrey*, 3 Wils. 125, 144; 2 Bl. Rep. 728.

(*n*) *Fearne*, 45.

(*o*) *Hodgson v. Ambrose*, Dougl. 337; *Warner v. White*, cited 6 Term Rep. 518; *Denn v. Bagshaw*, 6 Term Rep. 512.

The limitations which have been stated show the construction of law on gifts to the heirs of the bodies of husband and wife jointly; with a view to the difference of a preceding estate for life, taken by the husband and wife jointly, or by one of them alone, and of several preceding estates for life, taken by the husband and wife distinctly.

A gift to a man and his wife generally (*p*), or for their lives, and to the heirs of the husband or wife alone, and not of the husband and wife; or of one of them by the other of them; and either by the same clause in which the estate for their lives is limited, or by a distinct clause, is different from either of those gifts which have been stated.

The nature and extent of a gift in this form is to be noticed in this place.

By the gift to the husband and wife, they jointly, as between themselves, or rather by entireties, have an estate for their lives, and the limitation to the heirs will vest an estate-tail in the ancestor, with reference to whom the term heirs is used.

Whether the ancestor will have an estate-tail in possession or in remainder will depend on the relative state of the limitation to the heirs, in regard to the limitation to the husband and wife for life.

When there are not any intervening remainders, or there are such remainders and

(*p*) *Roe v. Aistrop*, 2 Bl. Rep. 1228.

they determine, the estate-tail will, as to the ancestor and every other person besides the joint-tenant for life, be executed, in the ancestor so as to be deemed an estate-tail in possession; and when there are intervening remainders, and while they are subsisting, the ancestor will have an estate-tail in remainder.

The husband and wife are, as between themselves, joint-tenants, or rather tenants by entireties for their lives; and the limitation to the heirs of the body of one of them will not affect the other, but the right of having the entire tenement by survivorship will take place; and should the ancestor to whose heirs the limitation is made, die in the life-time of his companion, the heirs will have an estate-tail in remainder.

Although the limitation to the heirs prescribes that these heirs shall be *the issue* of the bodies of the husband and wife, yet, if they are to be the heirs of one of these persons to be begotten between them, and are not to be the heirs of both of them, then the gift, so far as it comes within the scope of the present observations, will receive the same construction as a gift to a man and his wife, and the heirs of one of them, of his or her body, with a specification of the person by whom or on whose body the heirs shall be begotten.

As equally applicable to all estates-tail (*q*), under whatever denomination they may fall, it

(*q*) See F. N. B. on Formedons.

is material to observe, that when two or more persons, who are the issue in tail, and therefore seised in coparcenary, make partition by agreement, and it must be understood, without conveyance, and one of them dies without issue, the share allotted to that person will devolve to those persons who at that time are the issue in tail, inheritable under the form of the gift, for the estate-tail is not determined.

From this case the conclusion to be drawn, is, that notwithstanding the partition, the right of succession under the entail is not by any means abridged ; and that the persons to whom shares are allotted, are seised to them and the heirs inheritable to the entail, and not merely and simply to themselves and the heirs of their own bodies.

It was deemed necessary to notice this case, that no inference of a contrary tendency might be drawn from a partition between tenants for lives as noticed in the chapter on Estates of that description.

To the several species of estates-tail which have have been noticed may be added an estate-tail to a person and the heirs of his body, being *Protestants*, or to a person and the heirs of his body tenants of the manor of *Dale*.

Of this description is the entail of the Crown of England, viz. to the Princess *Sophia* of Hanover, and the heirs of her body being *Protestants*.

This is in legal effect an estate-tail, qualified as to the character of the persons who may give continuance to the estate-tail. In some degree, but not wholly, it may be arranged under the class of estates-tail qualified as to the degree to which they may descend.

So a gift to a man and the heirs of his body for years is, it should seem, a tail determinable^(r).

From the peculiar qualities of an estate-tail, and on principle, the same reasoning must apply to conditional fees; an estate may be limited to a man and the heirs of his body, or the heirs male of his body, being Protestants, or being tenant or tenants of the manor of *Dale*, with or without any other qualification.

Under such an entail no heirs, except of the given description, can succeed as heirs; and a younger son answering the description may take as heir under the entail, because the elder son; or if he be dead, the heir of his body, does not answer the description.

Again, the estate will continue as long as there shall be any heir of the body of the given description, although there may be an elder branch of the family not answering the description.

Again; the estate will determine in case, and only in case, there shall be an interruption to the descent, viz. when there shall for a time be no heir of the given description; and on

(r) Cro. Jac. 62; Moor, 773; 10 Rep. 87; Com. Dig. Devise, N. 2.

the principles of tenure, as applicable to grants, the date of livery, &c. the estate once determined could not revive, except that the existence of issue in *ventre sa mere* might possibly preserve the continuance of the estate.

That is a difficulty; and it is also a point of nicety whether a grandson would take as heir under the entail in the life-time of his parent, because the grandson answered the description in the gift, while that description was not fulfilled in the person of his parent. There is great reason to suppose, that the grandson could not, under such circumstances, make out a title in himself as heir under the entail.

On estates-tail which are determinable, or qualified, in respect of the heirs who may succeed, for example, *Protestants*, there is a great difference between such estates and estates in fee with a like qualification.

An estate in fee will determine when the next heir does not answer the description in the grant, and the fee so determined will not revive; and therefore if there should be a grant or devise to a person and his heirs *being Protestants*, or being tenants of the manor of *Dale*, or the like, the grant would determine when any other person than the heir for the time being, should be the tenant of the manor of *Dale*; or when it should happen that the first heir in the line of succession should not be a Protestant.

Although a person more remote in the line of heirs should be a Protestant, or should be a

tenant of the manor of *Dale*, that circumstance would not entitle him to take as heir; nor would it give continuance to the estate, for he is not heir.

Suppose that under a gift to a man and his heirs of his body begotten by his son; the son, from whose body the issue are to proceed, should survive his father, so that at the death of the father, there should not be any heir of the son (for till the death of the son there cannot be any person who can, under this gift, assume on himself the title of heir), a question might be made, whether the estate was not determined by a failure of issue. There is not any adjudication directly on the point, and for that reason nothing can be said positively as to the law on a case with these circumstances.

The case of *Repps v. Bonham* (s) seems, by analogous reasoning, to be an authority, and according to that case the estate created by this gift will determine in the event of the death of the father in the life-time of his son.

1st. Because there is not any one *in esse*, or *rerum naturâ*, to continue the estate.

2dly. Because an estate cannot cease at one time, and be in existence at another time.

To an argument grounded on the authority and principle of the case in *Yelverton*, it might be answered that it is not merely because they are the heirs of their father that the children of

(s) *Yelv.* 131.

the son are to be entitled under the form of the gift. These issue are to take as the heirs of their grandfather, and not of their father; and for the purposes of the gift the issue of the son may, under its special form, be the heirs of their grandfather in the life-time of their parent; for this case in no respect differs from those cases in which sisters may, on the special penning of the gift in tail, take in the life-time and to the exclusion of their brothers, who are the general heirs of their common parent.

There is still greater difficulty in deciding on the effect of such a gift, when the father dies in the life-time of the son; and at the death of the father the son has not any child:

The conclusion most consonant with the general principles of law is, that under such circumstances the estate-tail will determine, never to revive, notwithstanding the subsequent birth of issue to the son.

On estates-tail so qualified as to admit a more remote issue, in preference to more immediate issue, the following observations may be useful:

A gift to a man and his heirs of his body to be begotten, extends as well to the children born before the gift as to those which are born afterwards (t).

So as to a gift to the heirs of *A. procreatis* or *procreandis*, for *procreandis* extends to

(t) 1 Inst. 20 b; Com. Dig. Estate, B. 3.

(u) Temp. Talb. 31.

issues born before, as well as *procreatis* to issues afterwards (*x*). So to *A.* for life, and afterwards to the heirs of *A.* *procreatis*, or *procreandis*, and for want of such issue to *B.* shall be a general estate-tail, descendible to all the issue without exception (*y*).

And in like manner, under a gift to a man and his heirs of his body begotten, children born after the gift may succeed to the entail.

There is a case in 3 Leon. 87, which *prima facie* seems to the contrary of this position. In reality it is not of this tendency.

In that case there was a gift by feoffment to uses, to the heirs of a man *in posterum* (*anglice* thereafter to be begotten); and Lord *Hale* understood the case to have been so determined as if the children born before the gift were excluded, by reason of the words *in posterum*. From the state of the case in the report nothing decisive can be collected.

Wray, indeed, said, (*z*) "That the land should go to the son born after the feoffment, for that the word *in posterum* was a forcible word to create an inheritance, and that without that it had been a general entail."

In this case the question arose on a feoffment to uses. The feoffor having two sons, limited the use to the younger son, and the limitation, on which the doubt arose, was

(*x*) 1 Inst. 20 b. Com. Dig. Estate, B. 3.

(*y*) R. 1 Ch. Rep. 213; *Hebblethwaite v. Cartwright*, Cas. Temp. Talb. 31; Com. Dig. Estates, B. 3; Annotations, 1 Inst. 20 b.

(*z*) 3 Leon. 37.

made by way of remainder to the use of the heirs of the body of the feoffee, *to be thereafter begotten*. The point to be determined was, whether the eldest son of the feoffor, or a son born after the date of the feoffment, had the better title; and it was adjudged in favour of the after-born son.

According to this determination the heirs were, by the terms of the gift, to take as purchasers, and the words which named the heirs were understood to describe the persons who were to be entitled, and they were deemed sufficiently pointed to the future issue of the feoffor to exclude the sons already born.

Hebblethwaite and Cartwright (b) was to this effect: A. on his marriage settled lands to the use of himself for life, remainder to his first and other sons in tail-male, remainder to trustees for 1,000 years, remainder to his brother C. for life, remainder to the heirs male of his body *thereafter to be begotten*; and by the trusts of the term, he provided, that if there should be no sons of his marriage, portions should be raised for his daughters by the profits, or mortgage or sale, and that the term should be void if the father should prefer them in marriage with portions equivalent, or the remainder-man should pay them such portions. The wife died, leaving no son, but three

(b) Cas. Temp. Talb. 31; *Maule v. Selwyn*, 128; *Lomax v. Holmden*, 1 Ves. Sen. 290.

daughters; it was held that *C.* took an estate-tail, and that the words *hereafter to be begotten* did not exclude the children born before the settlement.

In all these cases, the words *heirs of the body* were *words of limitation*, while in the case cited from *Leonard*, they were words of *purchase*; and this circumstance materially distinguishes one case from the other.

It is an important consideration that all qualified and determinable estates-tail may, by means of a common recovery, become absolute estates in fee-simple; while a determinable or qualified fee, not being an estate-tail, cannot become absolute or discharged from its collateral quality, without a release of the *possibility of reverter*, or its descent to the owner of the determinable fee, or the event which is to take from the estate its determinable or defeasible quality (*d*).

Let it however be remembered that a common recovery duly suffered by a tenant in tail will discharge the estate-tail from all these determinable and defeasible qualities. This point will be more fully discussed in the next chapter.

The several species of estates-tail have now been examined.

From the propositions which have been advanced, it will appear that there may be as

many rules of succession, as there are species of estates-tail.

Extraordinary as it may seem, the questions which arose on this statute within the first fifty years after it was passed into a law were very few; in more modern times the number has greatly increased.

Till the reign of *Edward III.* (e) it had not been determined that a gift to a man and his heirs *male* of his body was a good limitation to confine the estate, in the course of its descent, to persons of that particular sex.

And for a long series of years it was doubted whether there could be an entail to keep the succession in the line of females, descended through females.

The statute (f) was considered as a family law, to preserve the property, and maintain the grandeur of the nobles and great men of those days. For that reason, and from the inclination of mankind in general to perpetuate their property in their families, the statute was liberally expounded. It was considered to be a remedial law, and extended to every case by which a limited fee, restricted to issue was given, in whatever terms the gift was expressed.

Under this statute every person might dispose of his real property, being tenements, in

(e) See the Year Books.

(f) 1 Dougl. on Cont. Elections, Introd. p. 8; 1 Burr. 215; per Ld. Mansfield; Erskine's Orat. at Cambridge.

the manner most agreeable to his inclination, and prescribe whatever order of succession his imagination could suggest.

The grievances of these entails were sensibly felt by the greater part of the people, and the courts of justice became as solicitous to restore the power of alienation as, in the first instance, they had been to abridge it. The Crown was particularly concerned in avoiding that quality of entails which rendered them unalienable and not forfeitable.

The aristocracy of this kingdom was, under the statute of entails, rendered less dependent on and far more formidable to the Crown. No forfeitures were incurred for treason; and the barons, by retaining their property unalienable, had the power to sustain the consequence of their families. Each successive generation was certain of enjoying the property of his ancestors; and there was little or no property to be distributed among the people at large.

To raise a competition between the mercantile *part of the community*, and the overgrown nobility, was now an object of state. In his oration at Cambridge, Mr. *Erskine*, that late distinguished ornament of the English bar, in treating of the statute *de donis* as a great barrier to the advances of liberty among Englishmen, and as obtained from Edward I. contrary to the notions of policy, has with great semblance of justice observed, that even the Crown of England had not sufficient strength to open

that liberty which sprung up from the dissemination of property; and he concludes, that if Edward I. could have resisted the law of entails, which he describes as wrested from him by his barons, to perpetuate their estate in their families, the English constitution, from a nearer equilibrium of property, had suddenly arisen to perfection.

It is highly probable, as formerly noticed (*g*), "That the feudal law originally gave rise to limitations in tail; and this observation receives some weight from the analogy of the term donation, as used among feudists; and the terms *donor* and *donee*, as applied to estates-tail.

It is certain that among the feudists, the succession under some gifts was wholly conducted by males (*h*); and that the words of *donation* did, in all cases, prescribe the order and course of descent.

Moreover, under the original establishment of an hereditary right (*i*), the succession was confined to the sons who were the immediate children of the feudatory. To enable the grandchildren to take, it was found necessary to make a constitution for the purpose; and under this constitution, the grandsons of the feudatory (*k*) were admitted to the succession;

(*g*) Wright's Ten. 16; 1 Dougl. Elect. p. 67.

(*h*) Burr. 115. (*i*) See Gilb. Ten. 9; 7 Vin. Ab. 568.

(*k*) 1 Dougl. Elect. p. 67.

and on failure of grandsons the brothers of the feudatory were allowed to be heirs.

A most important alteration was effected by the statute *de donis*. That statute is generally supposed to have converted the conditional fee of ancient times, into the qualified fee or estate-tail of modern times ; and to have rendered this qualified fee *a particular estate*, admitting of successive remainders ; as estates for life and in tail ; or of each or either description, with or without an ultimate remainder in fee ; and when the fee was retained by the donor, this fee, instead of being a possibility of reverter, became an actual estate, denominated the *reversion in fee*.

And the owner of this fee, whether it was a remainder or a reversion, was, as a consequence, at liberty, by a new grant, even while the particular estates continued, to create a new series of limitations for life and in tail ; and might give the ultimate fee as a *remainder*, or might retain it as a *reversion*.

These successive estates, with the various rules ingrafted on the law by the statute *de donis*, or of entails, with the various expositions of the statute ; and the consequences which the statute induced ; and the introduction of *fin*es with proclamations as a bar to entails (1) ; and the introduction of the fictitious proceeding by common recovery, as a species of assurance,

(1) 4 H. VII. c. 24. 32 H. VIII. c. 36.

and the means of barring the estate-tail, and the subsequent remainders and reversion, and all limitations subsequent or collateral to the estate-tail, have extended the laws of property into a system of great refinement ; far beyond the comprehension of ordinary minds ; and have involved the titles to property in that state of complication and difficulty, and consequent litigation, delay and expense, which are at the moment, while these observations are writing the subject of great and universal complaint. These inconveniences have prepared the mind of the Public to require a modification of the system ; and the simplification of titles ; so that sales may be effected, and purchases completed with greater facility, and purchasers may be rendered more secure in the enjoyment of property acquired by the fruits of hard-earned industry. And the Author of this Essay is employing a portion of his time in assisting in the accomplishment of this great and useful work of reform.

Even Lord *Coke* (*m*) in his time observed, as already noticed in chap. 9, that, “ When all estates were fee-simple then were purchasers sure of their purchases, farmers of their leases, creditors of their debts, the king and lords had their escheats, forfeitures, wardships, and other profits of their seigniories ; and for these and other like cases, by the wisdom of the common

(*m*) 1 Inst. s. 19 b.

law, all estates of inheritance were fee-simple ;
and what contentions and mischiefs have crept
into the quiet of the law by these fettered in-
heritances daily experience teacheth us."

CHAPTER X.

On the effect of different Assurances, and in particular, Fines and Recoveries, by Tenant in Tail.

It is of the first importance to understand the powers of alienation by tenant in tail.

That subject has received a large portion of attention in the First and Second Chapters on Conveyancing, and also in different parts of the Essay on Abstracts of Title. It will be expedient therefore, on the present occasion, only to add a short or summary view of the learning on this subject, as originally published in the Tract, now out of print, on Cross-remainders, and on the effect of Fines, Recoveries and other Assurances by Tenant in Tail, &c. &c.

By the statute *de donis*, it is provided, that a fine levied by tenant in-tail shall, *ipso jure*, be of no effect. In the construction of the statute, it was held that the fine was not actually void. It was only voidable; and even this restraint has, under certain circumstances, been relaxed.

Notwithstanding the statute, tenant in tail continued owner, with a power of alienation in fee, subject to be defeated by his issue, and the persons in remainder or reversion.

The invention of common recoveries, and the statutes making fines with proclamations a bar to the issue, have put the issue completely in the power of their ancestor. And it is of particular importance (because the subject frequently occurs in practice) to mark with precision, the distinct estates which pass by the conveyance of tenant in tail, when it imports to be a disposition of the fee.

First. A common recovery by tenant in tail, (if duly suffered) has the effect to bar his estate-tail, and all remainders over, and reversion depending on that estate ; and all conditions, and collateral limitations, annexed to the same estate.

And no condition or limitation, either in a common-law conveyance, or in a conveyance under the statute of uses ; or in a declaration of uses ; or in a will ; can take from a tenant in tail the right of aliening by a common recovery. The operation of that assurance is in effect, to extend or enlarge the estate-tail into a fee-simple (n).

But by suffering a common recovery, tenant in tail cannot derogate from his own acts ; or discharge the fee acquired under the recovery from the incumbrances which affected the estate-tail. After a recovery, the time or

(n) *Roe ex dem. Crow v. Baldwere*, 5 Term Rep. 111. Its operation is sometimes accounted for, as a conveyance excepted out of the statute *de donis*, 5 T. Rep. 111.

ownership of the estate-tail continues; and the operation of the recovery is to take from that estate the privileges and qualities annexed to the same, by the statute *de donis*, in favour of the issue, and of the reversioner and remainderman. It is a mode of assurance by which tenant in tail may alien in fee-simple. As observed by Chief Justice *Lee*, in *Martin v. Strachan* (a), a common recovery passes not a base fee, but a full, absolute, unlimited and rightful fee, and is to be considered as the proper conveyance of a tenant in tail, and passes the fee in the same manner as the fee is passed by a feoffment of tenant in fee.

Secondly. A fine must be considered either as creating a *discontinuance*, or operating merely as a *conveyance*. In the first instance it carves out a new title in fee-simple, without conveying the title under the old fee-simple. In the other instance, a fee determinable on the failure of the issue inheritable under the entail is conveyed. A feoffment has the like operation, with the like distinction between its effect as a *conveyance*, and as creating a *discontinuance*.

Thirdly. Assurances by *lease and release*, confirmation in enlargement of an estate, grant, bargain and sale, covenant to stand seised to uses, are all mere modes of *conveyance*; and all these assurances have their effect by passing

a fee determinable on the death of the tenant in tail, and the failure of those issue who are inheritable under the entail.

On a conveyance by fine, it must also be observed, that if the fine be levied with proclamations, pursuant to the statutes of 4 *Hen.* VII. and 32 *Hen.* VIII. the right of the issue under the entail, will be wholly defeated ; but when the issue are not barred (and they are not barred unless there is a common recovery, or fine with proclamations, or, in some special cases, a warranty), they, on the decease of the tenant in tail, by whom the alienation is made, may, by their entry, when there is not any discontinuance ; and by their action, when there is a discontinuance, defeat the estates of the person claiming under the alienation of the tenant in tail.

This observation equally applies to all the other modes of conveyance already enumerated, and which operate by way or in the nature of a grant. On the extent of the estates which actually pass by these modes of assurance there are several distinctions:

First. The recovery of tenant in tail, also his fine, or his feoffment, when it creates a discontinuance, passes an estate in fee-simple ; and his feoffment or fine not operating by way of discontinuance, and all the other modes of assurance of the third class, pass determinable fees. For in point of *limitation* of time, the estates taken under a common recovery, or a

discontinuance by fine or feoffment, will not determine till the title is impeached, consequently the estate is *absolute*, though it may be *defeasible*; for a distinction deserving of notice must be made between estates which are *determinable*; and estates which are *defeasible*. On the other hand, a *conveyance* by fine, bargain and sale, or by lease and release, &c. passes a fee of the same extent only in point of time, as the estate of the tenant in tail by whom the conveyance is made; and therefore this estate will determine when there is a failure of the issue inheritable under the entail.

The determination of an estate depends on its limitation; in other words, on the time for which it is to continue; and, of necessity, the estate must determine when it has filled the measure of its duration.

That an estate is defeasible must arise from some quality annexed to it; as from the circumstance of its being attended with a condition, or from the nature of the title, as being open to claims of persons who may impeach it. But a fee-simple, though defeasible, has not any fixed boundary for its determination. It will continue for ever, unless the claims of those who have a better title are enforced with success.

These considerations lead to some observations on the instances in which preference is to be given to a fine or common recovery, as a proper assurance by a tenant in tail, who is

merely tenant in tail; and also by a tenant in tail who is also the owner of the immediate reversion or remainder in fee.

As often as any estate is interposed between the estate-tail and the reversion or remainder in fee; and also as often as the reversion or remainder in fee is subject to any charge or incumbrance which does not affect the estate-tail, so often a common recovery is absolutely necessary to render the title free from objections. A fine would be an improper assurance. In the first case it would not, unless accompanied by a common recovery as part of the same transaction, bar the intermediate estates; and in the second case its effect would be to merge the estate-tail in the reversion or remainder in fee; to accelerate that estate, and consequently to accelerate the right of those in whose favour charges or incumbrances have been created on the reversion or remainder in fee (o). Some advantages, not common to a recovery, are certainly to be derived from a fine. The convenience of levying a fine in vacation, and with that expedition with which it may be passed through its different stages, renders it frequently the more eligible assurance. Its operation to bar strangers by non-claim also gives it a claim to preference over a common recovery, as often as the same effect can be obtained from a fine as from a recovery, considered merely as a form of con-

(o) 3 Convey. 241.

veyance by tenant in tail. To draw the line, in which, with a view to all cases, it is most prudent for a tenant in tail to convey by fine, in preference to a common recovery, is attended with some difficulty. Every case must depend, materially, on its own circumstances. These distinctions however may be taken.

A common recovery is the proper assurance by tenant in tail.

- 1st. When he is merely tenant in tail.
- 2dly. When he has the remainder or reversion in fee by *descent*.
- 3dly. When he has the remainder or reversion in fee, either by purchase or descent, and that estate is affected by some charge or incumbrance which does not affect the estate-tail.
- 4thly. When there is an intervening estate between his estate-tail and his remainder or reversion in fee; and the owner of the intermediate estate does not concur.

And a fine is the proper assurance by tenant in tail, when he himself has created the entail, and has also the remainder or reversion in fee immediately expectant on the estate-tail, and there are not any charges or incumbrances imposed on the remainder or reversion in fee, which do not equally affect the estate-tail.

These points involve learning of a very curious nature. They are also the subject of every day's practice. An elucidation of the

observations already made may, on this account, be useful to those students, to whom, from their inexperience, the reason of the distinctions may not be immediately obvious.

First, A common recovery is the only mode of assurance, by which a tenant in tail can rightfully *enlarge his estate-tail* into a fee-simple.

This conclusion will appear from the observations already made. A fine levied by a person merely tenant in tail, will not, in point of *conveyance*, enlarge his estate-tail into a fee-simple. It will confer a title to a determinable fee; in other words, to an estate to continue as long as there shall be issue inheritable under the entail: consequently, under these circumstances, preference is to be given to a common recovery. In short, a fine, if intended to convey the fee-simple merely under the ownership of an estate-tail, would be an improper and ineffectual mode of assurance. There are cases in which a tenant in tail is not capable of duly suffering a common recovery for want of the concurrence of persons in whom the estate, of immediate freehold is vested. In these cases, of necessity there is not any option between a fine and a recovery; and for this reason, the tenant in tail, or the persons who are content to purchase from him, must for the present be satisfied with the limited effect of a fine; since it is an effectual, and at the same time the only, mode of assurance, by which

the tenant in tail can bind his own issue. After the determination of the previous estate of freehold, the title may be completed by a recovery suffered by the tenant in tail, or if dead, then, as it is now generally understood, by a recovery suffered by his issue (p).

Secondly, When tenant in tail has the remainder or reversion in fee by *descent*, a recovery is certainly the more eligible mode of assurance, although there are not any intervening estates between the fee and the estate-tail, and although it is well ascertained that the remainder or reversion in fee is not incumbered or devised from the heir. Under these circumstances the efficacy of a fine to give a good title in fee-simple would depend on the facts.

First, That the remainder or reversion in fee expectant on the estate-tail is actually vested in the tenant in tail, and not in any person claiming under a conveyance or devise by his ancestor.

Secondly, That the ancestor hath not given any judgments, &c. which are a lien on the remainder or reversion in fee, or will give a remedy against the heir in respect of the descended fee.

Thirdly, That there are not any intervening estates capable of taking effect.

All these points, except the existence of bond-debts, which are binding on the heir

personally, without affecting the assignee, unless there be a suit depending to enforce the bond-debt, are material to a purchaser; and he will expect to be satisfied on these heads.

At a distant period it may be difficult to give satisfactory information on these points in answer to the inquiries of a cautious purchaser (*q*). To supersede the necessity of these inquiries it is always advisable, and, all things considered, less expensive, that a recovery should be suffered, as a certain and effectual mean of completing the title. It shortens the evidence of deduction of the title, by barring the remainder or reversion in fee, and putting that estate altogether out of the question; making the right or ownership of the tenant in tail, as such, the only criterion of the validity of the title; while, if the title depend on a fine instead of a common recovery, it is equally necessary to deduce the title from the tenant in tail, and, also, from the successive owners of the reversion or remainder in fee. There is an ownership arising from two distinct estates, and the title is constituted of the united ownership under these estates. It is therefore necessary that the title to the reversion, as well as to the estate-tail, should be traced to its source through every channel in which the reversion has passed (*r*).

Thirdly, When the tenant in tail has the re-

(*q*) *Sperling v. Trevor*, 7 Ves. J. 497.

(*r*) 1 Convey. 9; 3 Convey. 241.

mainder or reversion in fee, either by purchase or descent, and the reversion or remainder is affected by some charge or incumbrance which does not affect the estate-tail, a recovery is the only safe and effectual mode of assurance. It over-reaches and bars the reversion or remainder in fee, and all charges and incumbrances depending on that estate. The effect of a fine would be to take from the estate-tail the privileges annexed to it by the statute *de donis*, in favour of the issue; and the time of the estate-tail would merge in the time of the reversion or remainder in fee; and the charges and incumbrances affecting the reversion or remainder would become a charge on those persons to whom that estate, thus accelerated, gives the right of possession (s).

Fourthly, When there is an intervening estate between the estate of tenant in tail and his reversion or remainder in fee, a common recovery is the only mean by which the intervening estate can be defeated. A fine would operate on the estate-tail, and turn that estate into a base or determinable fee. In all these cases therefore a common recovery is certainly intitled to preference over a fine. In many cases, as it has already been observed, a fine would be ineffectual for the purpose of giving a good title in fee-simple; but when the tenant in tail himself has created the entail, and has also the remainder or reversion in fee immediately ex-

(s) 1 Convey. 14; 3 Convey. 241.

pectant on that estate, and there are not any charges or incumbrances imposed on the remainder or reversion in fee, except those which equally affect the estate-tail, then, and then only, preference may safely be given to a fine. No end is to be attained by means of a common recovery, which, under these circumstances, will not be accomplished by a fine with proclamations. Since the estate-tail is chargeable with the incumbrances affecting the reversion or remainder in fee, the time of the estate-tail, when enlarged into a fee-simple by the peculiar and extensive operation of a common recovery, would, to the extent of the whole fee-simple, continue chargeable with these incumbrances, because the estate-tail was subject to them. Under a fine, and the merger of the estate-tail, the incumbrances would affect the old fee-simple precisely in the same manner, and to the same extent, as they would affect the fee-simple derived out of an estate-tail. The only difference is, that in one case the continuing estate is the old fee-simple; in the other case it is, in point of legal ownership, a *new fee-simple* depending on the title to the estate-tail; although, with a view to its descendible qualities, the estate arising from the uses declared of the recovery, will be considered as part of the old dominion (*t*). But as the title to the estate-tail, and to the fee-simple out of which that estate was created, are in all material circum-

(*t*) *Butler v. Archer*, 15a.

stances the same, and as the existing incumbrances extend to both estates, the change of the estate-tail into a fee-simple; or the merger of the estate-tail in the old fee-simple, does not, make any alteration in the rights of the parties, or of any other persons.

Though in some cases, with a view to the devolution in a course of descent, it is material to distinguish between the old fee-simple, and the new fee-simple, yet, on an accurate investigation of the subject, it will be found that a fee-simple derived from an enlargement of an estate-tail is in fact, and in title, the *fee-simple* out of which the estate-tail was created (u). The right of excluding the interests of the persons who have the reversion or remainder after an estate-tail is a peculiar privilege and quality annexed to the estate-tail. In this sense a common recovery is properly considered as a conveyance excepted out of the statute *de donis*. 5 Term Rep. 111.

In all the cases of a fine which have been noticed, when the object is to bar an entail, the observations must be understood of a fine with proclamations. And in all the cases of a recovery it must be understood that the estate-tail was created by a person who was the owner of the fee-simple; for a fine without proclamations, though it would operate as a conveyance, or under circumstances as a discontinuance, would not bar the issue in tail and a recovery

(u) 1 Convey. 2.

by a tenant of an estate-tail, created by a person who has a base or determinable fee, will not give a larger estate than was in the person who created the entail (*x*).

In applying this learning there is more than ordinary difficulty when there are estates-tail to several persons, with cross-remainders between them. That subject is discussed in the first volume, p. 109.

It remains to be observed, that some tenants in tail are by the special provisions of Acts of Parliament, and all tenants in tail are, as against the king, having a reversion or remainder, by the common law restrained from exercising the uncontrolled right of alienating the fee-simple. These exceptions will be found in the first volume of Conveyancing (*y*).

From preceding observations, it may be inferred that a tenant in tail, as such, has not any devisable interest. But if he also have the ultimate fee he may, in respect of the fee, make a valid gift by will.

(*x*) 1 Convey. 2.

(*y*) P. 18, 144.

CHAPTER XI.

Of the Language by which Estates Tail may be created in Deeds.

By whatever mode of assurance an entail is created, the limitation which creates the estate is denominated a gift, and the creator of the entail is termed the *donor*, and the object of the entail, is termed the *donee* (*y*).

Any assurance which will convey a fee-simple will, with the requisite words of restraint or qualification, convey an estate-tail.

The words by which an estate-tail may be limited are now to be the subject of observation. For the sake of arrangement, they will be considered as used,

1. In deeds.
2. In wills.

And first in deeds.

The same rule which requires the limitation to be to the feoffee and his heirs, either by express words, or by words of direct and immediate reference, in order to the transfer of an estate in fee by deed at common law; also requires that, in order to the creation of an estate-tail by deed, the gift shall, either by express words, or by words of direct and immediate reference, be to the donee and his

heirs. So a gift to a man and his heirs, viz. heirs of his body, will, by reason of the qualification, be an estate-tail (z).

Words of reference will be sufficient to create an estate-tail; therefore under a gift to *A.* and his heirs of his body, remainder to *B.* in *eadem formâ*, or *eodem modo*, or the like expression, *B.* will have an estate-tail (*a*).

And, as under the doctrine of estates in fee there is an exception to the general rule, when a conveyance is in *frankalmoign* (free alms), so in the case of estates-tail, there is an exception when the gift is made in frankmarriage (*b*).

The nature of such gift, and the form in which it must be made, and the circumstances under which it may take place, are stated very fully in Lord *Coke's* Commentary on Littleton (*c*).

Gifts of this sort are now no longer in use. On this account no real advantage is to be expected from introducing the learning which relates to them. Another exception arises from the creation of nobility by writ (*d*).

The nature and qualities of estates-tail admit of one case peculiar to these estates (*e*). An estate even in a deed may, contrary to the general rule of law, arise from necessary implication. Thus, a gift to a man without any

(z) Hob. 172.

(a) 1 Inst. 385 b.

(b) 1 Inst. 90 a.

(c) 1 Inst. 21 b.

(d) 1 Inst. 10 a.

(e) Perk. s. 173; 10 Vin. Abr. 246, pl. 6; 2 Ld. Raym. 1152; 5 H. 5. 6.

limitation to his heirs, but with a provision that the land shall revert to the donor, or remain to another, if the donee shall happen to die without *heirs of his body*, will afford ground for the construction that the donee is to have the land to him and his *heirs of his body*, because the land is not to revert, or remain over, until there shall be a failure of these heirs ; and as *Perkins*, and after him Lord Chief Justice *Holt* states the reason to be, "*Quod voluntas donatoris secundum formam in cartâ doni sui manifeste expressa de cætero observetur.*"

And in *Idle and Cook*, noticed in a subsequent part of this chapter, *Holt*, Chief Justice, agreed that a gift in this form did create an estate-tail.

The true reason is, that the intent of the donor appeared *in express words* in the deed ; and the implication was a necessary one (e).

In treating of the words necessary to be used to convey an estate in fee by *deed*, it is laid down, with some doubts expressed, in a note, that the limitations to the *heirs* must be by that word in its plural number.

The word *heir*, however, in the singular number will create an entail. This is admitted by Lord *Coke*, and a case to the point has been already stated (f). In all the cases re-

(e) 2 Ld. Raym. 1152, 1 P. Williams, 78.

(f) Admitted in *White v. Collins*, Com. Rep. 289; *Fearne*, 6 ed. 153, a case on a will ; *supra* (281); *Fearne*, 6 edit. 180 ; See 10 Vin. Abr. 234, (K) pl. 1, on a will.

ferred to by Mr. *Hargrave*, as arising on *deeds*, the word *heir* was contained in the limitation of an estate-tail (*g*).

Indeed it may be assumed to be an incontrovertible position, that a gift by deed or will to a man and his heirs of his body in one sentence, or by several divided clauses, will create an entail, unless some particular meaning be affixed to the words "*heirs of the body*," which preclude that construction.

This is the result of the rule in *Shelley's Case*, so fully examined in the third chapter of the first volume of this Essay.

But when a particular meaning can be discovered, and it may be allowed without any inconvenience, it takes the case out of the rule. For on the general rule, that construction must be made on the several parts of the instrument, the sense, in which it shall manifestly appear that the parties have expressed themselves will be adopted by the courts; and therefore, where a testator devised lands to his son *F.* for the term of his natural life, and after his death to the heir-male of his body lawfully begotten, during the term of his natural life, and for want of such heir-male he gave the same lands to another son, &c. it was adjudged, that *F.* took only an estate for life (*h*); and had the question arisen on the same or the like

(*g*) As to copyholds, 2 R. Abr. 794; Style, 244, 273; *Pausey v. Lowdall*, Gilb. Ten. 254. Fearne, 6 ed. 62, on a will.

(*h*) *White v. Collins*, Com. Rep. 289; Fearne, 4 Edn. 280.

gifts in a deed, the nature of the instrument would not have varied the grounds of the decision.

The reasons of this determination were, that it was the intention of the testator that the heir male of *F.* should have an estate for life; and to apply the rule in *Shelley's Case*, and to consolidate the two limitations, and vest an estate-tail in *F.* the ancestor, would have been to make a construction in direct opposition to the express words of the devise, and the declared intention of the testator, and would have extended the gift to all the persons of a particular class, falling under a general description, while only one *individual* of that class, and of that given description, was the object of the testator's bounty, and within the extent of the terms in which the testator had expressed his intention.

Numerous other exceptions to the rule in *Shelley's Case* are adduced in examining that rule.

In deeds to have effect by the rules of the common law, or under a conveyance to uses, it will not be sufficient that there is substituted for the words *heirs* any other word which, in common acceptation, is of the same import. This will appear when notice is taken in reference to the immediate subject of this chapter of the words requisite to describe the person, by or on whom the heirs are to be begotten, and the cases for the negative and

affirmative of the position to be advanced, are stated.

In addition to the circumstance that the gift must be extended to the heirs, the words of the gift must, in direct terms, or by reference, contain words of *procreation*, to describe the body from which these heirs are to proceed, or the person by whom they are to be begotten (i).

Words of reference in limitations of estates-tail operate in the same way as words of reference in limitations of estates in fee. By the reference they have the effect of the very words to which the reference is made, and are precisely of the same import as these words, "*verba relata hoc maxime operantur, per referentiam ut in eis in esse videntur (k).*"

Thus lands were given to one and his heirs of his body (l), with remainder; in one case to another and his heirs *in form aforesaid*; in a second case, to another and his heirs aforesaid; and in a third case, to a man and his heirs, in the same *form*. And it was held in all these cases that the limitation in remainder passed an estate-tail (m).

Again, mention was made in a deed of the *heirs of the body* of J. and afterwards a limitation was made to him and the heirs of J. aforesaid, and it was held that this limitation created an entail.

(i) 1 Inst. 20 b; 2 Ld. Raym. 1152.

(k) 1 Inst. 359.

(l) 10 Vin. Abr. Estate, 251, T. 1, pl. 1. 2. cites 20 H. 6. 36.

(m) 10 Vin. Abr. Estate, U. pl. 5. cites 42 Ed. 3. 5 b.

In another case, a settlement was made on *A.* and the heirs male of his body, *with power of revocation*; *A.* recited the settlement to be to him and his heirs male (*n*), omitting the words of his body; and revoked the old uses, and by the new deed, made a limitation to himself and his heirs male, omitting also the words 'of his body;' and subjected the estate thus limited to a charge of 1,000 *l.*; and it was held that the recital referred to the limitation contained in the settlement, in favour of the heirs-male of the body, and that the limitation in the appointment of new uses referred to the recital, and adopted the words of the same; and thus circuitously referred to the settlement itself, and the limitation in tail thereby made; and it was held that an estate-tail was created by the appointment of the new uses.

It is the manifest intention, expressed by the reference to terms, clear and precise in themselves, and the adoption of these terms by the reference direct to them, which determines the courts in their construction of the words of reference compared with the words to which reference, is made; and therefore, when the words of reference are so indeterminate that they have not any direct or precise application they will be void for uncertainty.

On this ground a limitation to a man and his heirs in form aforesaid, after several limitations for different estates, as for life and in tail, will

(*n*) *Gilmore v. Harris*, 3 Lev. 213, 10 Vin. Abr. 234. in notis.

be void, because it is not clear that the parties had one limitation or the other in their contemplation.

The difference between the word '*aforesaid*' and the word '*same*,' as a term of reference, is generally illustrated by showing their different applications when there are several limitations (o).

The word '*aforesaid*' has not any immediate application to either of the gifts exclusively of the other. It is equally applicable to each of the gifts; and when they are for different estates, it cannot from its uncertainty have any effect. The word '*same*' always refers to the last of the several preceding gifts, and therefore a gift to a man and his heirs in the same form, after several limitations, one for life, the other, and last, in tail, will create an entail. It follows, that if the last of the several preceding limitations had not passed an estate-tail, the words of reference would have given an estate of the same quantity and extent as the estate created by the former and more immediate limitation.

In deeds, the words 'of reference' must be to the heirs in terms, and also to words of procreation.

In deeds, the term 'heirs' cannot be supplied by any substituted word; and though words which in strict propriety and common usage describe issue of the body, and even when

(o) 1 Inst. 20; 10 Vin. Abr. Estate, 251. T. 1, and note.

these very terms are adopted, still the limitation will not create an entail for want of the word heirs.

Other cases, containing the word *heirs*, are open to the objection, that they have not any words of procreation descriptive of those heirs which shall be the issue of the body of a particular person.

The rule which requires a designation of heirs by that or some equivalent term, equally prevails in application to conveyances to uses and to conveyances which owe their operation and force, and give the estate, merely by the common law (*p*).

Thus a feoffment to the use of a man and his issue male of his body does not create an estate-tail; for want of the word heirs (*q*).

Again; a gift by way of remainder was made to *B.* and his eldest son and heir-male of the said *B.* to be begotten, and so from the eldest son and heir-male of the said *B.* of his body to be begotten, to the eldest son and heir-male of the said *B.* of his body to be begotten, and for default of such issue, with remainder over; and it was agreed that these words did not give an estate-tail, though an estate-tail arose under other language in the deed (*r*).

It is to be observed, that the words "heir-male" were coupled with the word "son," and the several terms 'son and heir' were used in

(*p*) *Makepeace v. Fletcher*, Com. R. 457; Cruise on Uses, 140.

(*q*) *Nevill v. Nevill*, 10 Vin. Abr. 245.

(*r*) *Smye v. Chown*, And. 264. 10 Vin. 246.

the same sense, and as of the same signification; to describe an individual person, first, in the line of succession; and the words "heir-male" were not used in a distinct and independent sense, to comprehend the heirs-male collectively; as a class of persons who were the objects of the entail.

To express the intention, the words 'and so from eldest son and heir-male, &c. to eldest son and heir-male, &c.' were inserted at the conclusion of the same clause of the gift.

In this, which indeed is the only true point of view, the gift did not contain the word heir or heirs in the appropriated sense of describing legal and hereditary successors. Though the word heir was in the gift, it was confined to a description of the individual, who, for the time being, should be the eldest son and heir-male of a particular person.

Regularly, and to put the case beyond all doubt, limitations in tail, should, according to the different species of this estate to which the different forms are adapted, be in these or the like terms;

1st. To a man and his heirs, or heirs-males, or heirs-females, of his body:

To a woman in like manner, altering the word *his* into the word *her*; to adapt the expression to the sex:

2dly. To a man and to his heirs, or heirs-males, or heirs-females, of his body to be begotten on the body of *B.* &c.:

3rdly. To a man, and a woman not his wife, and their heirs of their *two* bodies to be lawfully begotten between them; and when there is another woman named to be a donee, changing the word *two* into the word *three*.

A limitation in the latter form has been the subject of some remarks in a former page.

Observe also, that when two men, or two women, or any two persons who may not lawfully intermarry, are to be the donees, the words '*two*' and '*between them*' are to be omitted; and that when the donees are to be *tenants in common* of the immediate freehold, or of the inheritance, and the law would, in the absence of expression, presume a joint-tenancy, or a tenancy by entireties, words of declaration to sever the tenancy should be added.

4thly. To a man and his wife, and their heirs of their bodies, between them lawfully to be begotten.

These are the proper forms of gifts. Gifts, however, may be expressed in different terms, and be effectual. The extent of the rule is only, that in all gifts, and in all limitations of use by deed or other mode of assurance, the heirs must, either by express words or words of reference, be limited to be procreated or begotten by or on some body or bodies in certain.

To create an estate-tail in an individual by a gift to him or her, with a limitation to either, in one clause, or in several clauses

to the heirs of the body by some other person, the limitation, must, in terms or in construction, be to his or her heirs of his or her body.

When the gift is to the heirs of the body of some other person, the heirs of the body will take the estate-tail as purchasers, and in their own right, and be the immediate donees.

As far as relates to deeds, the rule is positive that the word heirs must be used either in terms, or by reference and adoption. But the precise words 'of the body' are not necessary (s).

It is sufficient that the words of the clause of limitation, or some part of the deed which refers to this clause, and explains it; or a reference by this clause to some other part of the same deed, or even to a distinct instrument, should confine the gift to the heirs of the body of the donee or donees, or of some person or persons in particular (t).

It is not by the rule of law prescribed that the qualification of the gift should, in direct words, or by express terms, be in the immediate clause of the gift to the donee (u).

All that is required is, that by the frame and context of the deed the gift should be restrained to the heirs of the body, and not extended to the heirs generally.

(s) 7 Rep. 41; 1 Inst. 20 b. 27 b.

(t) 10 Vin. Abr. Estate, U. 1. 4.; 1 Inst. 20 b.

(u) 1 Inst. 20 b. 27 b.

This point depends on the rule (*u*), that all the clauses of a deed are to be taken into construction together, and construction made on the several parts. The entire instrument must be construed by its parts, so that every clause, and every word of every clause, may have effect, unless it be insensible, or repugnant, or contrariant to the former part of the deed; or unless it be inconsistent with the rules and policy of the law (*x*).

Whenever it is to be collected, in construction on the clause of immediate gift of the estate, or from a clause which introduces the limitation of another estate, or refers to another part of the same instrument, or to another instrument; that the gift under consideration, is not to extend the benefit of the limitation to any heirs, besides those which are of the body of the donee; the generality of the word heirs will be qualified, and restrained to mean *heirs of the body* (*y*).

To proceed to the illustration and application of the rule.

An estate-tail will pass, by a gift to a man and his heirs;

1. viz. The heirs of his body (*z*).

2. Of himself (*de se*) issuing or lawfully begotten (*a*).

(*u*) 1 P. Wms. 457. Shep. Touch. p. 87; *Evans v. Astley*, 3 Burr. 1570. (*x*) Shep. Touch. 87.

(*y*) See 10 Vin. Abr. 261, *Estate*, U.

(*z*) Hob. 172; 21 H. VI. 7; 13 H. VII. 24; 2 Ld. Raym. 1182.

(*a*) 2 Ld. Raym. 1153; 1 Inst. 20 b.

3. Of his flesh (*de carne*) (c), or,

4. Of his wife begotten (d).

5. Which he shall happen to have, or beget ; without naming any person on whom these heirs are to be begotten, or from whose body they are to proceed ; or by specifying the person on whose body the heirs are to be begotten ; as on the body of his wife ; the body of a particular woman as his *first* wife (e) ; or *Mary Searle* ; so, however, that when the man and woman are not married, there be not any impediment which will make it *always unlawful* for them to marry.

So will a gift to a woman and her *heirs* by A. begotten or to be begotten (f).

And, more generally, as often as a gift prescribes that the heirs to which the limitation is made, shall be begotten by the donee, by directing that he shall beget them ; or that they shall be his heirs on the body of some particular woman, an entail will be created (g).

The rule has been carried still farther ; for in one instance, as has been already noticed, there was a gift to a man generally by deed, without any limitation to his heir or heirs of the

(c) 1 P. W. 73 ; 33 Ass. pl. 15 ; 2 Ld. Raym. 1153 ; 1 Inst. 20 b.

(d) 2 Ld. Raym. 1153 ; 1 Inst. 20 b.

(e) 2 Ld. Raym. 1153 ; 1 Inst. 20 b ; And. 309, pl. 318 .
1 Rep. 140 b. ; 1 Inst. 26 b. ; 1 Rolle, 837 ; Est. Q. ; 7 Co. 659.

(f) 1 Inst. 20.

(g) 7 Rep. 41 ; 2 Bac. Abr. 260 ; 1 Inst. 20 b.

body (*h*), but with a declaration that the land should revert if the donee *should* happen to die without *heirs of his body*, and it was held that the donee had an estate-tail.

This consequence proceeded from the expression of the time when the land comprised in the gift should revert. From this clause it was necessarily concluded to be the intention of the parties that the donee should have the land in the mean time. The reference was to mark the time of continuance of the prior gift, and the words "*heirs of the body*" were used as the terms of description of that time; and the gift was considered to be of the same effect as if it had been directly to the donee *and his heirs of his body*.

This is the legal mode of accounting for the decision of this case.

In *Chudleigh's case* (*i*), a feoffment was made by Sir *Richard Chudleigh* to the use of himself and of his heirs *of the body of Elizabeth the wife of Thomas Carew to be begotten*, without limiting, in express words, that those heirs should be of his body; or that he himself should beget them; and the Chief Baron of the Exchequer was of opinion that Sir *Richard Chudleigh* had the fee, and not an estate-tail; for that it was possible that the issue begotten of the body of *Elizabeth Carew* might be the

(*h*) Perk. s. 173; 2 Ld. Raym. 1152; 10 Vin. Abr. 246.

(*i*) 1 Rep. 140; 1 And. 309; Popham, 70.

heirs of the said *Richard Chudleigh*; but the Court intending that the words to be begotten must necessarily refer to heirs to be begotten by Sir *Richard Chudleigh* the donee, it was held by the *two Chief Justices*, and adjudged, that the limitation to Sir *Richard*, in these words, gave him an estate to him and such issue as he should beget on the body of the said *Elizabeth Carew*; and consequently an estate in special tail.

So if land be given to a man and to his heirs, which he shall beget on the body of his wife, the husband hath an estate in special tail, and the wife hath nothing (k).

This doctrine was recognised and approved in the case of *Chudleigh*; and Lord Coke (l), in his *Commentary on Littleton*, observes, that it had been said, *that if a man give land to another and to his heirs of such a woman lawfully begotten, this was no estate-tail for the uncertainty by whom the heirs shall be begotten; for that the brother of the donee, or other cousin, may have issue by the woman, which may be heir to the donee; and estate in tail must be certain*; and referring to *Chudleigh's* case, he remarks; that opinion had been over-ruled, and the estate adjudged to be an estate-tail, and that 'begotten' should be necessarily intended 'begotten by the donee'.

(k) Litt. s. 29. *St. John and Valentia*, 10 Vin. Abr. 243.

(l) 1 Inst. 26 b.

When the words explanatory of the heirs intended to be benefited by the gift are precise, and descriptive of heirs of the body, the terms of explanation supersede the necessity of any comment to show the grounds of the case.

The words of *himself begotten*, express an intention that the heirs who are to entitle themselves to the land, under the limitation shall sustain a more particular character than the *general heirs* of the donee. They clearly confine the gift to those heirs which *he shall beget*; consequently to the heirs of his body.

The determination which is an authority for *this* point was pronounced in the case of *Beresford* (m).

In that case, a feoffment was made by *Aden Beresford*, by deed, to *William Fleetwood*, among other uses, to the use of *Aden Beresford*, and the heirs-males of *the said Aden* lawfully begotten, and then over.

It was objected that *Aden* had an estate in *fee-simple*, and not in *fee-tail*. The reason assigned, in support of the objection, was, that the words '*of the body*' were wanting; so that the limitation was only in effect to the use of *Aden*, and the heirs-males of the said *A.* and the subsequent words '*lawfully begotten*' were implied, as every heir ought to be lawfully begotten.

(m) 7 Rep. 41.

But it was *resolved* that *Aden* took an estate-tail, and that all the remainders over were *vested*.

It was agreed by the Court, that to the creation of an estate-tail, it is requisite, in all gifts and limitations of use, that the heirs shall be limited to be procreated by, or begotten on, some body certain, either by express words, or by words amounting to so much; and that the precise words *de corpore* (of the body) are not necessary to the creation of an estate-tail, so long as there are words which amount to so much.

The case in 5th Hen. V. fo. 6, stated in a subsequent part of this chapter, was cited with approbation, and held to warrant this conclusion.

And it was resolved, that if land be given to one and the heirs of *himself issuing*, an estate-tail is created; and on the case of 5 H. V. 6 (n), it was observed, that the principal cause of the adjudication was by force of the preposition *de* (for these gifts were made in Latin), and on the ground that the heirs were in that case designated by the words *de se exsuntibus*.

In the case of Beresford, it was further resolved, that there were in the gift, then before the court, expressions that did amount to the words *of the body*; and that, as the statute *de donis* directs the intention of the donor,

(n) 10 Vin. Abr. 243; 37 Ass. 15.

manifestly expressed in his charter, to be observed for the future, that construction should be made in this case which would,

1st. Stand with the rule of the law,

2dly. With the intention of the donor.

3dly. Give effect to all the parts of the indenture, so that they might stand together.

Therefore it was said, translate the limitation to *Aden* into Latin, and then it is *ad usum Adeni et hæredum masculorum de dicto Adeno, legitime procreatorum*; or *et hæredum masculorum legitime procreatorum de dicto Adeno*; and that it would be as much as if it had been said *by the said Aden lawfully begotten*, for all was one in effect; and this word *de* or *ex* coupled with the subsequent word '*procreatorum*' did appropriate the heirs-males to be of the body of *Aden*; and that *de Adeno*, or *ex Adeno*, and *de corpore Adeni*, were all one; and it was insisted that this case was directly proved by the 5th H. V. fol. 6; that in that case there were the words '*de*' and '*ex**euntibus*'; and that in this case there were the words '*de*' and '*procreatorum*'; and that the different expressions were all of the same effect.

And, to an objection that the limitation might well be construed *ad usum dicti Adeni*, &c. in the genitive case, *legitime procreatorum*, and not *de dicto Adeno*, it was answered and resolved, that the remainders being introduced by the words, 'and for default of such issue',

it ought to be *de dicto Adeno*; for otherwise it would be against the meaning of the giver, and all the words of the remainders would be void, and that such construction should always be made, that all the parts of the deed might stand together, if they might stand with the rule of law; and that the subsequent clause was, *and for default of such issue*; and issue could not be born of *Aden*, if the words were not *ex Adeno*; and therefore one clause well explained the other; and the case was determined accordingly.

The resolution pronounced in *Abraham and Twigg (p)*, adjudged 38 Elizabeth, was cited in the case of *Beresford*, as an authority that the limitation gave an estate in fee, and not an estate-tail.

That case arose under a conveyance to uses.

After an estate-tail, given in the most express and proper terms, another limitation was made to the use of *Gabriel Dormer, et hæredum masculurom suorum legitime procreatorum*; and a third limitation expectant on the one immediately preceding, was introduced by the words, '*et pro defectu talis exitus ad usum, &c.*'

And, on a demurrer, the material point was, whether the limitation of use to *Gabriel* and his heirs-males lawfully begotten, and *pro defectu talis exitus*, without the words heirs-males of

the body, made an estate-tail, or an estate in fee-simple; and the court unanimously agreed, that, for want of words of appropriation or procreation in the limitation of the use, the estate was a fee-simple and not a fee-tail.

The words of limitation which gave rise to the question in *Abraham and Twigg* were in English, and afterwards turned into *Latin* (*q*), and the point was adjudged, on great deliberation.

The difference between these cases is, on a first view, so very trifling, especially to persons unaccustomed to weigh the nicety of words, and the strict legal import of sentences, that it may not be easily perceived.

The cases, as far as they are material as authorities to the points for which they are adduced, are stated fully, that a judgment may be formed on the arguments of the several cases.

Beresford's case is the leading authority on one side; the case of *Abraham and Twigg* is its contrast.

In *Abraham and Twigg* there were not any words of appropriation, which, in express terms prescribed or which necessarily required the construction, that the heirs should proceed *from*, or be begotten *by*, or *on*, any particular body.

The utmost extent of the words of the gift was, that the persons capable of taking under

the limitation should be the heirs-male of *Gabriel*, and be lawfully begotten ; and that, for want of such issue, the lands should remain to other persons ; but these words did not direct that the heirs should be the issue of any particular person.

So as they were the heirs-male of *Gabriel*, the remainder-man, the intention of the parties, expressed in the limitation, would be fully answered ; for all heirs, whether general or special, must be *issue* of some person ; they must proceed from lawful intercourse, *i. e.* be born under the wedlock of their parents.

In this view, these words, heirs-males lawfully begotten, did not appropriate the gift. They did not expressly, or in construction of law, apply to any particular person, as the body from which the issue, inheritable to the entail, should proceed.

In this particular, the case of *Beresford* was widely different. In that case, the limitation not only directed that the persons who were to take the estate in succession under the limitation should be heirs male ; it proceeded to require that they should be the lawful issue of a particular person, by prescribing that they should *be begotten by him* ; making the words *heirs-male* (one branch of the sentence, and the words of the said *Aden begotten* a second branch of the same sentence.

The arguments of the Court before which the

case of *Beresford* was decided, lead to this construction: they clearly express the sense in which the Court understood that case.

The punctuation of the case in the books in which it is reported require a different construction; but, under the circumstances of this case, punctuation is not to be considered as any part of the matter of the book, and may safely, and in truth ought to be disregarded. The arguments of the Court are beyond all doubt the best guide to the interpretation.

Whether a case like *Abraham v. Twigg* would at the present day receive the like determination is very questionable.

The case of *Idle* and *Cook* is the same in circumstances and determination with the case of *Abraham* and *Twigg* (r). The observations offered on the latter case may be applied to the case now cited, and they will distinguish this case from the resolution in the case of *Beresford*.

In *Idle* and *Cook*, copyhold lands were surrendered, *ad opus et usum*, *Zacheria Cliff*, (the surrenderor,) for life, and after his decease to the use of *Valentine Cliff*, his eldest son, and *Alice* his wife, *pro et durante termino vitarum suarum et hæredum et assignatorum prædictorum Valentini et Aliciæ, et pro defectu talis exitus*, then over.

On a special verdict, the question was, whether the estate limited to *Valentine* and

(r) 1 P. W. 70; Salk. 620; 2 Ld. Raym. 1144; 2 Bac. Abr. 260; 11 Mod. 57; 10 Vin. Abr. 245.

Alice was an estate-tail only, or a fee-simple; and by three Justices against *Gould*, it was decided to be an estate in fee-simple. *Gould* delivered a long and elaborate argument in support of his opinion. It is given very fully in *Peere Williams's Reports*, and is well worth the attention of the student.

This case was decided on the arguments and reasoning relied on in *Abraham* and *Twigg*; and Lord Chief Justice *Holt* observed, that the case of *Abraham* and *Twigg* was so strong that it could not be answered.

In *Doe* on the demise of *Littledale* against *Smeddle* and others (s) :

Henry Littledale, in contemplation of marriage, made a settlement, by which he conveyed the premises to trustees 'in trust, for the use of himself for life, then to the use of his wife for life, and then in trust for the use of his first son, and the heirs of such first son; and from and immediately after the determination of that estate, in trust, for the use of his second, third, fourth, fifth, and all and every other son and sons, and their several and respective heirs, and for default of such issue, then to the use of all and every of his daughter and daughters, and their heirs, to take as tenants in common and not as joint-tenants, and for want of such issue, then in trust, for the use of the right heirs of the survivor of himself and his wife for ever.

(s) 2 Barn. & Ald. 126.

The question arose on the gift to the daughters; and by *Abbott, C. J.*: "The general rule of law is, that by the word 'heirs' in a deed is meant heirs general; and even if it be admitted that there may be other expressions in the instrument, which, from their nature, may show that the intention of the parties was to use the word in a more limited sense, still it by no means follows that the Court will adopt that limited sense in those parts of the deed where the intention of the parties is not perfectly apparent. It may be admitted, in the present case, that the settlor, in the limitations to his first and other sons, used this word as meaning heirs of the body. But if it were necessary to form a judgment of what was his intention when he used it in the limitation to his daughters, I should be of opinion that it would be best effectuated by construing the expression as there meaning heirs general, and by holding that the daughters under it took estates in fee. It is, however, quite sufficient for the decision of this case to say, that it is not plainly shown that in this limitation the word 'heirs' is used in the confined sense of 'heirs of the body'. It follows, therefore, that the general rule of law must prevail, and that the word 'heirs' must be taken in its larger meaning;" and by *Holroyd, J.*, "Although it may be quite true, that the word heirs, in the respective limitations to the eldest and to the other sons, must in this deed be construed to mean heirs of the body;

yet it does not follow that it must be so construed in the subsequent limitation to the daughters. For the word heirs is only to be construed contrary to its more usual sense, where that is necessary, in order to carry into effect the clear intention of the party using the expression. But where that is not necessary there is no reason so to do ; and the word must then be taken in its usual legal sense. Now, in the last limitation to the daughters this necessity does not exist ; and therefore the word heirs there must mean ‘ heirs general.’ And if we were to hold that it was to be construed as heirs of the body, great inconvenience would follow. For, according to *Doe v. Worsley* (†) there would be no cross-remainders, inasmuch as *cross-remainders in a deed cannot be raised by implication*. Lord *Kenyon* there distinctly lays it down, ‘ that with regard to deeds, *the rule is positively settled that there can be no implication whatever in a deed ;*’ and that case expressly decided the point. We should therefore counteract the probable intention of the settlor, if we were in this case to hold that the daughters of *Henry Littledale* were under the settlement to take estates in tail. For in that case, supposing that five out of six had died, it might happen that five sixths of the estate would go over to the heir of their mother by her second marriage ; *ex. gra.* a son, instead of the whole vesting in the sixth and surviving daughter as

(†) 1 East, 416.

heir. That would, I think, defeat the intention of the settlor, and it therefore seems to me not only that there is no necessity for restraining the meaning of the word heirs to heirs of the body, in order to carry his intention into effect; but that in all probability we should actually counteract it if we were so to decide;" and by *Bayley, J.*: "It is to be observed, that this is a case arising not on a will, but on a deed, and the circumstance of these *being limitations of uses makes no difference*; for according to the judgment of *Lord Holt*, in *Idle v. Cooke (u)*, *limitations of uses must be construed according to the rules applicable to common-law deeds*. The word heirs may be used undoubtedly in the sense of heirs of the body, where the necessity of the case requires it. But where that necessity does not exist, there it must be taken to be used in its plain and natural sense; and to mean heirs general. Now, in the first limitation in this deed, the word is necessarily used in the restricted meaning on account of the subsequent limitation to the second son. For the deed speaks of the determination of the estate of the eldest son, which could not happen if by the word heirs was meant heirs general; for there could be no failure of heirs general to the eldest son whilst the second son remained alive (*x*). The same observations will apply to the limitation over

(u) 2 Ld. Raym. 1144.

(x) As to Wills, see *infra*.

to the second, third and other sons. But in the limitation to the daughters there is not the same necessity to restrain the meaning of the word heirs. And if we were to do so, the inconvenience pointed out by my brother *Holroyd*, of the estate going over *by parcels* to the heir of the wife by her second marriage, would be introduced, and in that case we should construe the word heirs contrary to the general rule of law, without knowing clearly whether by so doing we were carrying the intention of the settlor into effect."

It follows, that in the last case, the gift to the daughters limited a fee, and not an estate-tail to them.

The case is, however, introduced for the more important purpose of showing, that, in the opinion of the Court, the use declared in favour of the *first son*, and the heirs of such first son, created an estate-tail; being a construction induced in part by the circumstance that the subsequent gifts were introduced by the words, and *from and immediately after the determination of that estate*; while the gift to the daughters and their heirs was not reduced to an estate in tail by the words, and *for want of such issue*.

Thirdly, A gift to a man and his heirs *of his flesh* is so pointedly descriptive of the heirs which are to inherit under the entail, and so express in confining the gift to the issue of the body of the donee, that on a case so restricted

in expression, no doubt can be entertained of the appropriation; and the observations offered on this case are merely with a view to distinguish it from a gift to a man and the heirs *of his blood*. Under such a gift all the heirs of a man, in whatever line they stand, whether the ascending, descending, or collateral, and in whatever degree they are related to him, may take, since they are all within the given description, *i. e.* all of his *blood*.

Fourthly, On a gift to a man and his heirs, of his wife begotten, some observations have been already offered.

The necessity of a long comment on the extent of these words of limitation is therefore unnecessary. The ground of the cases which have settled the law to be that a limitation in this form passes an estate-tail is, that from the penning of the gift, the courts will intend that the heirs in the contemplation of the parties are those only which the husband shall beget on the body of his wife; and in construction the courts will supply the words "by him."

Besides, there is a restriction to the issue of the body of the woman, and the construction is, that the heirs are to be begotten by the husband on the wife. This cannot be a fee-simple on account of the limited extent of the interest, and the qualification of the heirs to take by descent.

Fifthly, The several gifts made ; in the first instance to a man and the heirs which he should happen to have of his wife ; in the second, to a man and his heirs which he should happen to have of his first wife ; and in the third instance, to the use of a man and his heirs on the body of *Elizabeth*, then the wife of another man, lawfully begotten, &c. &c. are open to similar observations. In fact, some of these gifts are in such terms as remove all occasion for intendment to give them their proper effect.

In each of these cases no person could entitle himself as heir within the terms of the gift, unless he was the issue of the donee by the woman, who was named in the clause of limitation.

Though the woman was in the line of succession to the donee, and might have had issue, and these issue have been the general heirs of the man ; or heirs might have been raised to him by some one who was in the line of succession to him, yet issue of this sort, unless begotten by the donee himself, were not within the descriptive terms of the gift. For the gift did not simply require that the heirs should be the issue of the woman ; but in the first case they required that they should be the heirs which the donee himself should have by her. The like observation applies to the second and third instances ; and though in the first and second instances the limitation did not, in express terms, direct that the heirs inheritable

to the entail should be the heirs of the donee, the construction of law upon these gifts supplied these words. In the third instance, it was in the most positive terms prescribed, that the heirs designated by the limitation, should be the heirs of the donee; and no heirs, even of the donee, could entitle themselves under the qualified terms of the gift, unless they were his issue on the body of the woman named in the limitation; and therefore the gift, collectively considered, was confined to the heirs of the body.

It may be doubted whether a clause of limitation to the donee and his heirs, *if he shall have heirs of his body, or if he shall have heirs of his own flesh, &c.* will substantively, independently of the clause for reserving the reversion, pass an estate-tail. No case occurs in which a substantive limitation in this form has been adjudged an estate-tail; nor are there any determinations to the contrary.

According to *Fleta*, a limitation with such words of qualification will give a fee on condition, and not a limited fee, properly denominated an estate-tail.

It is not necessary that the words of procreation, descriptive of the person by whom, or on whose body, the heirs inheritable under the entail are to be begotten, shall be in the clause of immediate gift to the donee.

It will be sufficient, that on the collective sense of the will or deed, it appears, that by

the heirs described in that clause, heirs of the body were intended.

A gift to a man and his *heirs*; and if he shall die without heirs of his body, or without *issue male of his body*, or to a man and his heirs-males; and if he shall die without heirs-males of his body, or *issue male of his body, or of himself*, or in like form, then to others (*y*), conveys an estate-tail; for the subsequent words demonstrate the qualified sense in which the word heirs is used; and the several parts of the instrument show that no heirs are to be entitled under the terms of the gift, except those which are the issue of the body of the donee.

On the context of the instrument, it appears that no one is to take under the limitation unless he be an heir of the person to whom the gift is made. The remainder is to take effect on failure of the heirs or issue of the donee; and from this circumstance it must be concluded, that those heirs only which answer this description are within the extent of the former limitation; as has frequently been observed, the rule of construction applicable to all deeds is, that the several parts of the instrument must be considered together, so that every part may have effect and construction be made on the several parts of the deed or instrument.

Now construe the former limitation to extend

(*y*) *Canon's Ca.* 3 *Leon.* 5; *Dutton v. Engram*, *Cro. J.* 427; 19 *H. VI.* 74 b. cited in a note to *Doug.* 266; *Boteler v. Allington*, 1 *Bro. Ch. Cas.* 72.

to the heirs generally, and the estate limited in remainder would be a fee upon a fee, and be void. Therefore, that all the parts of the deed may have effect, the word heirs in the former limitation must be understood to be qualified by the words introducing the remainder, so as to restrain the gift to the heirs of the body, and negative its extent to the heirs generally ; and the addition of the words *for ever* as declaratory of the time for which the estate is to be enjoyed by the heirs, or the word assigns, as descriptive of the power of alienation to be exercised by the tenant, does not make any difference, when the intention is so clearly expressed.

In the idea imported by each of these terms there is nothing inconsistent with an intention to pass an estate-tail. Besides, to whatever extent they may seem to oppose that construction, the general intention must prevail ; and the words of limitation do, in cases circumstanced like those under consideration, most clearly furnish the evidence of a limited and entailed inheritance. The whole instrument taken together evinces the meaning of the author of the limitation to be, that the property which is the subject of his gift, shall revert to himself, or be enjoyed by some other person, as soon as there shall be a failure of *heirs of the body* of the person who takes under the gift in question ; and no construction, save that only which creates an estate-tail, can give effect to this intention.

The operation of the subsequent clause is to abridge and correct the words of limitation used in the preceding sentence, by explaining their import; and the words in this clause are allowed to have this effect for the purpose of conforming to the intention of the donor, and ascribing to him some meaning in the use of the different clauses of the deed.

The following limitations are of the same description. Of course they fall within the extent of the observations already made, and fully prove them to be well founded.

A gift was made by deed to *R.*, and *K.* his wife, and their heirs, and to the *other heirs* of the said *R.*, if the said heirs of the said *R.* and *K.* should die without heirs *of themselves*; and on a demurrer (*b*) this gift was held to create an entail by reason of the words of *themselves*, which appropriated the heirs, of which there was to be a failure, to particular heirs, that is, the heirs of themselves, or of their bodies; distinguishing them by these terms, from *their* general heirs.

On the case last introduced, it may be observed, that two distinct estates were limited, the one a special entail, the other a fee-simple, by the words 'or heirs of *R.*' for the donor had declared that the order of succession should in the first place be regulated by a reference to the joint heirs of the husband and wife, and extend to and include in a secondary

(*b*) 5 H. V. 6. 7 Rep. 41; 1 Vaugh. 273; 1 P. W. 76.

consideration, and under a more remote gift, all the heirs of the husband.

Though the limitations were in direct terms to *R.* and *K.* and their heirs generally, the subsequent words led necessarily to the conclusion that these heirs were to be of the bodies of *R.* and *K.* and that the general heirs of *R.* were to be entitled when there should be a failure of heirs of the former description.

This intention was clearly imported by the direction expressed in the gift, that the other heirs of *R.* (thereby referring to the heirs of *R.* alone, and separately, as distinguished from those of *R.* and *K.* jointly,) should be comprehended within and benefited by the gift; and the subsequent words followed up this notion, and confirmed the inference, that by the heirs of *R.* and *K.* were meant the heirs of their joint bodies; it being stipulated that the heirs of *R.* alone were to be entitled when there should be a failure of heirs of the bodies of *R.* and *K.*, and not till that event should have taken place.

In another case (*c*), tenements were given to *B.* and his heirs, to have and to hold to him and his heirs *for ever*, if he should have *issue of his body* engendered; with a provision, that if he should die without *heirs of his body* the lands should revert to the donor; and it was held that the donee had an estate-tail.

And in a third case (*b*), a man gave land to his son, to hold to him and his heirs, if he should have heirs *of his flesh*; and if he should have no heirs *of his flesh*, then by the provisions of the deed the land was to revert to the donor and his heirs.

Belknap argued that the deed proved the land to be given in fee-simple, depending on a condition that the donee should have heirs; and that since the donee had heirs, (for so the fact was) the condition was performed, and he had a fee-simple.

Percy answered, that construction was to be made upon the whole deed, and not upon parcels; and that by the whole deed it appeared that the gift was to the donee and the *heirs of his body*; for that the reversion for default of heirs was reserved to the donor; and a clause of warranty to the donee and his heirs which he should have of his flesh, being contained in the deed of gift; *Percy* argued from this circumstance, that the words of the gift were qualified and explained.

And it was adjudged, that the donee had an estate-tail.

The ground of the adjudication was, that the deed proved that the land was given to the donee and his heirs of his flesh or body. That the reversion on default of heirs of the body of the donee was reserved to the donor, necessarily led to that conclusion.

In addition to these cases, it has been determined that when lands are by the premises of a deed given to a man and *his heirs*, and the *habendum* limits the same lands to the donee and the *heirs of his body*, the words of the *habendum* explain the words of limitation to the heirs to mean heirs of the body (e).

Between this case and a limitation in the premises to the heirs of the body, *habendum* to the heirs generally, there is a difference.

By limitations in the form last mentioned the party who is the object of these limitations to take under the same, will have an *estate-tail* by the grant in the premises, and by the limitation in the *habendum* (f), a fee expectant.

All that is to be inculcated on this head is proved by the cases which are adduced. These cases show that a subsequent clause may explain a former one, admitting the reference to be clear; and that the several clauses may be considered as parts of the same sentence, and this is the point insisted on.

In all these and in similar cases the effect of the limitation depends on the intention which is disclosed. As often as there is a clear intention that an *entail* shall be created, the limitation will give an estate of that description.

The last-cited case may be contrasted with

(e) *Thurman v. Cooper*, Poph. 138; 1 Inst. 21; 8 Rep. 154; Sand. 150; 21 H. 6. 24; Com. Dig. Est. B. 21.

(f) 1 Inst. 21.

the determination, *Cooper v. Franklin* (g) In this case *John Walker* made a feoffment in fee to *Thomas Walker*, to hold to him and his heirs of his body, to the use of him, his heirs and assigns, and a question was raised, whether *Thomas Walker* was tenant in tail, or had a determinable fee; and the Court adjudged that he was tenant in tail. They founded their determination on the opinion that the use to him, his heirs and assigns, immediately succeeding the *habendum* which limited the estate, must be intended to refer to those heirs who were to be entitled under the entail. Suppose the declaration of use had been expressed in favour of a stranger; and admit that an use may arise on the gift of an estate-tail (which is a point not decisively settled (h), and the *cestui que use* would have taken a determinable fee. The better opinion seems to be, that tenant in tail may stand seised to an use actually expressed; and that no averment of an use shall be allowed to be made upon his estate.

To *Cooper v. Franklin* may be added the case of *Doe ex dem. Hanson v. Fyldes* (i), though the last case arose on a will, and the former on a deed. In the present case the widow *Scofield* devised, in these words:

“ It is my will and mind, and I do hereby give, bequeath, grant, alien, release and con-

(g) Cro. Jac. 400; Moor 848; 1 Inst. 19 b.; Poph. 188.

(h) *Andrews v. Blunt*, Dyer, 311, a; 312 a; Godb. 269.

(i) *Doe v. Fyldes*, Cowp, 833.

firm all and every part of the said messuage, tenement, and all and every the lands, &c. thereunto belonging, unto my eldest daughter, *Alice Scolefield* and the *heirs of her body* lawfully to be begotten *for ever*. And for *want of such issue* then to my daughter *Anne Scolefield* and the *heirs of her body* lawfully to be begotten, *for ever*. And for *want of such issue*, then to my third daughter *Margaret Scolefield* and the *heirs of her body for ever*. And for want of such issue, then to my youngest daughter *Judith* and the *heirs of her body for ever*; and for *want of such issue*, then to the *right heirs* of me the said *Alice Scolefield*, for ever: *charged* and chargeable, notwithstanding, with the full sum of *nine score pounds*, to be levied and raised out of the *first* clear annual and *yearly issues and profits* of all and every the said messuage, tenement, lands and premises aforesaid, and after my decease to be equally distributed amongst my three youngest daughters, *Anne*, *Margaret*, and *Judith*, as the same shall be so raised, &c. for and towards their maintenance and better preferment. And it is my will and mind, that my executors hereinafter mentioned shall and may stand and be seised, possessed, and interested of and in all and every the said messuage, lands, tenements, &c. with their appurtenances, from and immediately after my decease, for so long a time as until they or their assigns shall, may, or lawfully might have fully *raised*, received and taken up the afore-

said sum of *nine score pounds* over and above all costs and charges, as the same shall be so raised, to and for the benefit of my said daughters, *Anne, Margaret, and Judith* equally, or so long as until the same shall or may be paid and discharged by my *eldest daughter Alice Scolefield* or her heirs; and from and after the raising and receiving or other payment of the said sum of nine score pounds by my daughter *Alice Scolefield* or her heirs; it is my will and mind, that she and her heirs shall have, hold and enjoy the said messuage, &c. for ever, only allowing my three youngest daughters *Anne, Margaret, and Judith*, and my cousin *Edmund Scholes*, the kitchen and the rooms over belonging to it, to have and dwell in, until they shall happen to be married, and no longer."

And it was contended that the testatrix at first intended to give an estate-tail to all her children successively; then she seemed to have considered that the younger were to come in for their legacies of money immediately, and, therefore, to have meant to give the land to the eldest in fee, and that the latter devise, considered in itself, was clearly a devise in fee.

Lord *Mansfield*, after stating the will, proceeded to observe, "Now the single question upon the construction of the will is, whether the words '*heirs of Alice Scolefield*' thrice repeated; relative to the redemption of the term, vested in the executors, shall be construed

to refer to the special designation of the heirs to whom the estate is devised in the beginning of the will; or to introduce a new and more general denomination of heirs, and to amount to a revocation of the express estate-tail given in the beginning of the will, with all the remainders over to the three sisters, and the reversion in fee to the testatrix and her right heirs." He added, "It is manifest that the first devise is an express estate-tail to each of the four daughters successively; and that the testatrix meant to charge the first estate-tail to her eldest daughter with the sum of 180*l.* for the *immediate* benefit of her other three daughters. For the devise is in these words, 'charged and chargeable notwithstanding, &c.' In the same clause she particularly expresses her intention that the sum should come out of the *possession*, and not out of the *inheritance*, because it is to be raised *out of the first and clear yearly and annual profits*. To effectuate this intention she is advised to create a term in her executors to receive the rents and profits *quousque*. So that there are in the clearest words successively estates-tail subject to this charge; or, if I may use the expression, this sum of 180*l.* is to be raised *previous* to any of the estates-tail. If the matter had rested there, without any other words in the will at all, *Alice*, or the heirs of her body, would have had a right to redeem the term vested in the executors; for it was an incumbrance prior to

their taking possession under the estail-tail. Of course, if they raised the money, they would have a right to have the term surrendered or assigned. The testatrix when she mentions this payment makes no *new devise*, but only supposes it a thing that may happen. For she says, "That her executors shall stand possessed, that is, receive the rents and profits till they or their assigns shall have raised this sum; or for so long time as till *Alice Scolefield* and *her heirs* shall have discharged the same; after which payment she and her heirs shall enjoy the said messuage, &c. for ever." What is to be paid or discharged? A sum of money to the three younger sisters. Who is to be hurt if it is not paid? *Alice Scolefield* and the heirs of her body. Who was to pay? *Alice* and the heirs of her body. And it is to be paid to those who would be her heirs if she *had no issue*. The word "*heirs*" therefore, in this part of the will, is used in contradistinction to the sisters. If the word "*heirs*" is used in the first place, it must be so used in the several other places that follow. Nothing is to be implied from the additional words "*for ever*," because that expression is repeated by the testatrix in the devise of each of the estates-tail.

The nature of the provision affords a strong argument that she did not mean to change the sense of the word "*heirs*" in this part of the will, and to give a *fee-simple*; because it would be absurd and nonsensical to make a

distinction between raising money by rents and profits, or by mortgage or sale, or charge on the inheritance. Where the first taker has a *fee-simple* what does it signify how it is raised? But where the *possession* and the *inheritance* are different, a direction to raise a sum of money out of the rents and profits is a burthen thrown upon the possession in favour of the inheritance. As when an estate is given to *A.* for life, remainder to *B.* in tail, and a charge is made upon the rents and profits, there the estate of tenant for life goes in ease of the *inheritance* (*k*). The testatrix here might not think of a common recovery. She appears to have meant that her family-estate, which was but a small estate, should go to her family clear and unencumbered." And he concluded his observations in the name of the Court, saying, "We are therefore unanimously of opinion that the eldest daughter took only an estate-tail."

Also, under a gift to a man and his heirs (*l*), to the use of him and his heirs of his body, he will have an estate-tail; but whether at the common law, or by means of the statute of uses, is not clear (*m*).

And under a gift to a man to the use of him and the heirs of his body he will have an estate-tail at the common law.

To explain these cases, it is necessary to ob-

(*k*) This doctrine must be read with caution.

(*l*) Owen, 64.

(*m*) *Jenkins v. Young*, Cro. Car. 230, 245.

serve, that an estate arising under a limitation of use cannot be more extensive than the legal estate from which the use is to be supplied with a seisin (n).

In the first case, the gift must have either operated to pass the legal fee, and the declaration of the use have had effect as limiting an estate-tail to vest under the statute of uses ; or the expression of the use must have been considered as part of the limitation of estate, and agreeable to this construction it must have explained and qualified the general limitation to the heirs. Under each construction an estate-tail is created.

In the second case, it was objected that no estate-tail was created. The ground of this objection was, that the legal estate, limited to supply the uses was merely for the lives of the husband and wife, and therefore could not give a seisin for an estate-tail. The objection was overruled, on the ground that the expression of the use was part of the limitation of the *estate* which passed by the conveyance ; and not a distinct and divided sentence from the limitation of the estate ; and a distinction was made between an estate limited to one person, and an use to another person ; and an estate and an use limited to the same person.

In the latter case the expression of the use might explain the intention of the grant, while

(n) Dyer, 186 ; Com. Dig. Forfeit.

in the former case the use was distinct from the grant, and therefore could not influence the construction of that clause.

And, even where a gift was made to a man and his heirs, to the use of him for life (*o*), it seems to have been held that the limitation of the estate and of the use were distinct, even though a forfeiture was the consequence of that construction, and the case of *Piers v. Hoe* (*p*), which affords the authority for this conclusion is distinguished from the case of *Jenkins v. Young*, by the observation, that the declaration of the use cannot abridge an estate expressly limited, while it may explain a grant in indefinite terms; and there is sound reason in this distinction (*q*).

The argument drawn from a warranty, &c. is apposite, and may have its weight when it is indifferent what construction the words of limitation shall receive: Thus, when a limitation is in direct terms to a man and his heirs generally, it will not be qualified to mean heirs of his body merely because the warranty is confined to these heirs. It might be the agreement of the parties to the deed, that the warranty should be for the benefit of those heirs only which should be the issue of the feoffee, and not for the benefit of his heirs generally. This

(*o*) See Cases collected in Vin. Abr. 158. Grants, P. a.
Hone v. Clerk, Owen, 64; 1 Leon. 125. (*p*) Cro. Eliz. 131.
 (*q*) *Crawley's case*, Owen, 126; Cro. Eliz. 721.

is the reason of the difference which has been noticed.

In all the cases stated as authorities to the points, insisted on, the instrument, collectively taken, confined the gift, in point of extent, to *the heirs of the body*. The observations added, in exposition of some of those cases, detail the reason on which all these cases have been decided; and it will be obvious that the general intention prevailed, in influencing and governing the determinations.

As connected with the present subject, it may be useful to state, that Lord *Coke* (*r*) has the following passage, "If a man make a charter of feoffment of an acre of land to *A*. and his heirs, and another deed of the same acre to *A*, and the heirs of his body, and deliver seisin according to the form and effect of both deeds, in this case he cannot take a fee-simple only, as some hold; for that livery was made according to the deed in tail, as well as to the charter in fee; neither can the livery enure to the deed of estate-tail with a fee-simple expectant, for that livery was made as well upon the deed in fee-simple as the deed in tail. Therefore, others hold, that in that case it shall enure by moieties, that is, to have an estate-tail in the one moiety, with the fee-simple expectant, and a fee-simple in the other moiety; and so the livery shall work immediately upon both deeds."

(*r*) 1 Inst. 21 a.

And in 2 Rolle's Rep. 23, *Doderidge*, Justice, treats the point as ruled accordingly.

And it is to be observed, that the clause which introduces the remainder, must *in deeds*, and in reference to the preceding limitation, when it is general (as to a man and his heirs,) be by express words, or by some equivalent expression, and for default of heirs *of the body*, or of heirs-males *of the body*, or of issue of the body, or issue *of himself*, meaning the donee, and referring to him; and thus by the context confine the gift to the *heirs of the body*.

Though a limitation in a deed to the issue of a man's body will not create an entail, the words and 'for default of issue *of his body*,' in a clause introducing a remainder, will, even in a deed, qualify the word heirs generally to mean heirs of the body.

A limitation to a man and his heirs *generally* will not be qualified to mean heirs of the body, by a clause which introduces a remainder to take effect in default of *heirs generally(s)*, or of heirs-male generally, or of such heirs of the donee, without express mention that these heirs are to be of his body, unless, perhaps, the person who is to take in remainder be of the whole blood of the person who is to take under the preceding limitation, and in the line of heirship to him, and except in the particular cases of a donee, being a *bastard* or a *denizen*.

(s) *Tilburgh v. Barbut*, 1 Ves. 89.

It is to be observed, that the case of a *bastard*, and consequently of a *denizen*, was doubted by Lord Ch. Justice *Holt* (t).

In a *will* (and the case is more strong when the question arises on a deed), a limitation was made to a man and his heirs, remainder over *if he should die without heirs*, and there was not any restriction that those heirs should be of his body (t), and it was held that the first devisee had an estate in fee.

In a case with these circumstances there is not any expression from which it can be inferred that the heirs of the person to whom the first limitation is made, were to be the issue of his body, and therefore the subsequent limitation could not alter the preceding positive devise to the heirs generally.

This point was determined in *Attorney-General v. Gill* (u). In that case, a man by his will devised an annuity of 50 *l.* per annum to *A.* and his heirs; and if *A.* died *without heirs*, using this phrase generally, without any direction that the heirs, of which there was to be a failure, should be of the body of *A.*, then to a charity. *A.* died in the lifetime of the testator without issue of his body, and afterwards the testator died; and on a demurrer by the executors to an information brought against them to establish the charity, it was argued in support

(t) *Idle v. Cook*, 1 P. W. 70.

(u) 2 P. W. 369. *Grymble v. Jones*, 11 Mod. 207. 8 Vin. Abr. 248.

of the demurrer, that the words, "if *A.* died without heirs," not saying heirs *of his body*, but heirs *generally*, were void. It was answered, that a will ought to be taken agreeably to the intention, and that the intention must be construed according to common parlance; and that in common parlance a man is said to die without heirs, or to have no heir, when he is dead without issue; and that this construction ought rather to prevail in the present case, as the remainder was limited to a charity. But *King*, (Lord Chancellor) said, "Suppose the devise void if given to a common person, so shall it be also when given to a charity. The devise being to *A.* and his heirs, and if *A.* die without heirs, to a charity, such devise over is void; and the word heirs shall not be construed to signify heirs of the body, where the devisee over is *not* inheritable."

And in *Abraham v. Twigg*, already stated, a feoffment was made to the use of *Gabriel Dormer*, and his heirs-*male* lawfully issuing; and for default of *such* issue, without prescribing that they should be issue of the body of the donee, remainder over; and also in the before-stated case of *Idle and Cook*, a limitation on a surrender of a copyhold to uses was in words nearly similar, and certainly to the same purport, and it was held that the words 'and for default of such issue,' as they did not express of whose body the issue were to proceed, and as they had not any reference to words of limitation to heirs of the body, did

not qualify the generality of the word heirs in the former limitation.

When the remainder is introduced by these words "and for default of issue of the body of the donee," or, with reference to the donee, of the *body of him*, or issue of him, or to that effect, then, for the reasons assigned in *Beresford's case*, the introductory clause will explain the word heirs to import *heirs of the body*.

Thus, *Richard Canon* (x), by feoffment, gave all his lands, tenements, &c. to the use of himself and his wife, for their lives, and to the use of the right heirs of him the said *Richard*, and of the assigns of him the said *Richard*, and of the assigns of him the said *Richard* after the decease of him the said *Richard* and *Johan* his wife; and if it should happen that he the said *Richard* should die without issue of *his body begotten*, in that event all his lands were to remain to *Thomas* his brother, and to the right heirs of his body begotten, and to their heirs and assigns for ever; and it was the opinion of the Court, that a good estate-tail was by that deed limited to the said *Richard* in use, after the death of his wife.

Again, a feoffment (y) was made to the use of the feoffor for life, remainder to *W. R.* his son, and his heirs, and for want of such issue of him, then to the right heirs of the feoffor; it was objected, that although this would have been an estate-tail in a will, the authorities

(x) *Canon's case*, 3 Leon. 5. Shep. Touch. 109.

(y) *Lee v. Brace*, 3 Salk. 337, cited 1 Madd. 390.

which proved it to be so likewise proved it would be otherwise in a *deed*, as in the case before the court ; but *Holt*, Chief Justice, would not admit this observation to be well founded, for, he said, " This is but one entire sentence of limitation, the sense whereof is very plain ; and the rule of law is only that an estate of inheritance cannot pass without words of inheritance ; but there is no rule of law that words of inheritance may not be qualified or abridged by subsequent words ; therefore in *this* case *W. R.* hath only an estate-tail, though *by deed*, it being in one sentence, viz. to his son and his heirs make a fee-simple, yet the subsequent words " and for want of issue *of him* " make an estate-tail, by qualifying and abridging the first words (z).

The case of *Lee and Brace* is reported in the several books cited in the margin (a) ; but differently ; some state the case with the circumstance that the remainder was limited to commence on default of issue generally ; others with the circumstance that the remainder was limited *totidem verbis*, to commence on default of issue *of the body* of *W. R.* *Salkeld's* Report is in all probability the most correct ; and in *Bacon's Abridgment* it is said that the same point was adjudged upon this very deed in *C. B.*

(z) See *Parker v. Thacker*, 3 Lev. 70 ; on the like argument in a similar case on a *will*.

(a) 1 Ld. Raym. 101 ; 12 Mod. 101 ; *Holt*, 668 ; *Carth.* 343 ; 5 Mod. 266.

between *Cooke & Roberts*. The point of law determined by those cases was recognized by *Holt (b)*, in delivering his opinion on the case of *Idle & Cook (b)*. In that case, he admitted, that if it had been said, if *Valentine* and *Alice* die without issue of *their bodies*, these words being express, and particular, would have created an estate tail.

From the pleadings in 3 Ld. Raym. 99, and also 5 Mod. 266, it appears that in *Lee v. Brace* the words of the subsequent clause directed that the remainder should take place on default of *heirs of the body* by these very words, and the statement of the pleadings is likely to be correct.

In proof of the position, that the precise words "*of the body*" are not necessary to the validity of a gift in tail, and that it is sufficient that the words of the clause of limitation, or some part of the deed which refers to this clause, and explains it, do confine the gift to the heirs of the body, no authority can be more apposite than *Gilmore v. Harris (c)*. In fact, the principle of that case warrants more than has been advanced, for the part of the instrument before the court did not contain a limitation to the heirs of the body. It merely referred to such a limitation in another instrument, and in reciting that instrument it omitted the words "*of the body*;" and then, assuming that recital as the effect, or a

(b) 1 P. W. 78.

(c) 3 Lev. 213.

correct transcript of the clause from which the recital was taken, it expressed the limitation in the instrument before the court in the terms of the recital. Still, however, it is to the *clear reference* made to the former deed, and the limitation to the heirs of the body contained in that deed, that the judgment of the court is to be ascribed.

The case of *Gilmore and Harris* (d) was to this effect: *Edward Monford*, being seised in fee by lease and release, dated 27 and 28 Feb. 1675, conveyed the tenements in question to the use of himself for life, remainder to trustees, for supporting contingent remainders, remainder to the first and other sons, and the heirs-males of their bodies successively, remainder to *Simon Monford* and the heirs-males of his body, remainder to the heirs-males of the body of Sir *Edward Monford*, father of *Edward*, remainder to the right heirs of *Edward*, with power to *Edward*, by deed sealed, &c. to revoke the uses limited to *Simon and the heirs-males of his body*, and to limit new uses. And afterwards *Edward Monford*, 2d Mar. in the same year, reciting the deed of the 28th Feb. (by which deed power was given to him to revoke all the uses limited to *Simon Monford* and his heirs-males (omitting the words 'of his body'), he by that deed revoked all the uses limited to *Simon* and his heirs-males (omitting the words 'of his body'), and appointed the said

(d) 3 Levinz, 213.

estate in the said deed named to be to the said *Simon Monford* and his heirs-males, provided that the said *Simon* should pay to the wife of *Edward* 400*l.* and 600*l.* to the appointer's executors within six months after his decease. *Edward* died without issue male, leaving *Elizabeth Harris*, wife of the defendant, his daughter and heir. *Simon* died without issue, leaving *Edward Monford*, lessor of the plaintiff, his brother and heir. It was argued at the bar for the plaintiff, that the revocation was good, notwithstanding the omission of the words "of his body," for the recital of the deed is right in the date and the names of the parties. And therefore by the words "heirs-males" must be *intended* such heirs males as are expressed in the deed, viz. heirs males of his body. *But, secondly*, they argued that the new limitation to him and his heirs-males is a fee-simple, on these grounds :

First, A limitation to a man and his heirs-male in a deed always passes a fee-simple, but it is otherwise in wills.

Secondly, The deed of revocation being made within three days after the deed of settlement, it could not be intended that he revoked the first estate to give himself the same estate through the new limitation, as he had by the first settlement.

Thirdly, The new limitation is subject to the payment of 1000*l.*, which could not be intended to arise out of an estate-tail.

And it was adjudged by the whole Court for the defendant, whether the revocation was good or not; for if it was good, as they held that it was, for the reasons alleged for the plaintiff, then the same words in the new limitation would have the same construction as they had in the recital; and would carry a new estate-tail, and that estate-tail could be charged in its creation with the payment of a sum of money, for that it is the will of the donor. Therefore the words in the new limitation, *scil.* the said estate in the said deed mentioned, shall be to the use, &c. which *said estate* was an estate-tail. But he had not the power to revoke more than an estate-tail, and besides that, he could not create a fee, for all the intent appears upon the whole matter, to revoke the estate-tail which was not subject to any charge, and to create a new estate-tail to be subject to a charge of 1000*l.* And if the first estate were not revoked by reason of the omission of the words "of his body" in the recital, then the first estate is unrevoked, and the estate of *Simon* determined, and the remainder in fee vested in the defendant, the right heir of *Edward*, and so, *quacunque data*, judgment ought to be; and it was given for the defendant.

Lord *Eldon* relied very strongly on the like reasoning in his observations on the case of *Wykham v. Wykham* (e).

(e) 18 Ves. 395.

From all these cases it may be assumed as a general position, that though the word *heirs* stands general and uncorrected in one sentence, it may, by the clause of another sentence, which introduces an ulterior gift, be corrected and explained, if the word *heirs* generally in the first clause, is by the words of the second clause explained to mean *heirs* of the body.

But though an introductory clause may qualify the generality of the word *heirs*, it will not enlarge the words of a preceding limitation when that limitation is made to *heirs* of a particular description. Therefore assume the case that a gift is made to a man and the *heirs-male* of his body, and the remainder is introduced by the words "and if he shall die without *heirs of his body*" (f), omitting to express that the *heirs* shall be *males*, an estate in *tail male* only will pass.

This is a rule in deeds as well as wills, and applies to a variety of cases, of which the example is only a single instance.

The case of *Atkins v. Atkins* (g), is at least, to a certain degree, within the scope of these observations. In some measure too it is connected negatively with the observations on the rule in *Shelley's Case*.

In the case of *Atkins* and *Atkins*, a father

(f) 8 Vin. Abr. 271. And 8, pl. 17; *Clarton v. Glasier*, cited Moor, 124; *Glover v. Tracey*, cited 2 Leon. 226; see *Fitzgerald v. Leslie*, 5 Bro. P. C. 14; as to wills, see *Turke v. Frenchman*, Dyer, 171.

(g) Moore, 593, pl. 801; Cro. Eliz. 248; and cited 2 Ld. Raym. 1440.

devised to *John*, his son, and his heirs of his body, and added this clause, "Item, I will, that after the decease of my son *John* my land shall remain to *George*, son of *John*;" and, notwithstanding, it was held that *John* had the inheritance in tail, and that his widow was dowable. So that words introducing a remainder did not abridge an estate clearly and expressly devised.

Nor will any expression of intention in a clause introducing a remainder, give an estate to any person who is not within the express terms of the preceding gift; for an express estate is not to be varied by *implication*.

Thus, a gift to husband and wife, and to *the heirs of the body of the husband*, and if the husband and wife died without issue of their *two bodies (h)*, then the land to remain over; and it was held that the estate of the wife was not enlarged, and that the inheritance was in the husband alone.

It frequently *happens*, that a gift in special tail is penned in terms which do not appropriate the heirs to *the person*, though it requires them to be of *his body (i)*; and, on the mere words, it is not clear to whose heirs the limitation is made; and the word heirs may be applied indifferently to one or other of several persons named in the clause of gift.

(h) 1 Rep. Co. 104, cites 12 Ed. III. *Variance*, 77.

(i) Com. Dig. Estate, B. 5.

In cases of this sort the question is always in whom the estate-tail shall vest.

The cases which have received a decision on the point, warrant this distinction (*k*).

When the gift is made to *one* person, as to a man and to the heirs which he shall beget on the body of A. B., the words of limitation are taken, constructively, to pass the inheritance to the donee.

The words of limitation to the heirs apply as well to the woman as to the man; yet as the gift is to the man alone, it will, from this circumstance, be inferred that he alone is the object of the gift; and that he, and those heirs who shall proceed from his body and the body of the woman, shall take *as his heirs*; and the estate-tail will, accordingly, vest in him alone.

Also, if a gift be to the husband and his wife; and the issue inheritable to the entail are to be the heirs of his body, without any reference to his wife, or with a reference to *her*, so as to describe her as the person on whose body the heirs are to be begotten, the husband alone will have an estate-tail.

On the contrary, when the gift is to *a man and to a woman, and the heirs (l)* which the man

(*k*) Litt. s. 26, 27; *Hale's MSS.* on the text in Harg. & Butler's edit. of 1 Inst. and 1 Inst. 26 a; *Gossage v. Taylor*, Styles' Rep. 325; Fearne, 44; app. *ad contra*; see also Yelv. 131; *Merrill v. Rumsey*, Sid. 247.

(*l*) Litt. s. 26, 29; 1 Inst. 26 a; Harg. Anns. 3 Edit. 3. 32; Fearne, 41, 45; *Stephens v. Brctridge*, 1 Lev. 36; *Reps v. Bonham*, Yelv. 122; *Roe v. Aistrop*, 2 Black. Rep. 1228.

shall beget on the body of the woman, or the heirs on the body of the woman, by the man lawfully to be begotten (*m*); or to a husband for life, remainder to the wife for life, remainder to the use of *the heirs* to be begotten upon the body of the wife by the husband (*n*); as the word heirs inclines no more to one donee than to the other, and both the persons of whose bodies the issue are to proceed are donees, and to all appearance equally the objects of the donor's intention, they will be tenants in special tail in joint-tenancy, or by entireties, according to the circumstance that they are husband and wife, or persons not married, at the date of the gift.

The material circumstance of the several cases is, that, in the construction of the words, it is indifferent to which of the donees the word heirs is applied; for when the gift limits the heirs to be of one of them, to be begotten by or on the body of the other of them, this appropriation will direct the construction in favour of the person from whose body the heirs are to proceed; and the subsequent words will be taken to describe the person by whom or on whose body the heirs are to be begotten.

Thus, a gift to a man and his wife, and the heirs of the husband, or heirs (*o*) of the body

(*m*) *Denn v. Gillott*, 2 T. R. 431; Fearne, 4 edit. 45.

(*n*) *Gossage v. Taylor*, Styles' Rep. 325; 10 Vin. Abr. Estate, 273.

(*o*) *Reps v. Bonham*, Yelv. 131; Fearne, 45, 46, 47; Litt. s. 26, 27, 28, 29; Harg. Co. Litt. 26, b. n. 3.

of the husband (*p*), which he shall beget on the body of his wife, or the heirs of *the body of the husband* on the body of his wife lawfully begotten (*q*); is an entail in the husband alone; for though the heirs are to be begotten on the body of the wife, they are to be the heirs of the husband alone. The sense of the words of limitation to the heirs is complete, when the gift is extended to the heirs of the body of the husband, and the following words are to be understood, as added merely to ascertain the body on which these heirs are to be begotten.

A limitation in this form is to be read with a pause between the words of limitation and the words of procreation, thus: to *A. B.* and the heirs of the said *A. B.*—which he shall beget on the body of *C. D.*; and the construction must be agreeable to this mode of reading the limitation.

So a gift to a man and his wife and the heirs of the body of the wife by *R.* to be begotten, is an entail in the wife alone (*r*); for the word heirs, which makes the inheritance, are annexed to the body of the wife alone, and the words by *R.* to be begotten, merely ascertain the particular person by whom these heirs are to be begotten, without requiring that the issue, inheritable to the entail, shall be his heirs (*s*).

(*p*) *Roe v. Aistrop*, 2 Bl. R. 1228.

(*q*) *Martin v. Moulin*, 1 Burr. 969.

(*r*) *Fearne*, (4 ed.) 46, 47; Litt. s. 26, 27, 28, 29; Harg. Co. Litt. 26 b, n. 3; *Reps v. Bonham*, Yelv. 131.

(*s*) *Merril v. Rumsey*, T. Raym. 126. Sid. 247.

Another distinction remains to be noticed : When a gift is to a man or woman for life, with a remainder to the heirs of that person, and of another person who is the husband or wife of the donee, or with whom the donee may intermarry, the words heirs, &c. are words of purchase, under which the heirs take originally as persons described by that name ; and are not words of limitation to vest the estate in the man or woman to whom the gift is made.

The inheritance will vest in those persons in whom the description of heirs of the two persons shall be fulfilled, if these persons are married, or may lawfully intermarry.

This case is noticed by Mr. *Fearne* (t), as between husband and wife, when a gift is made to one of them for life, remainder to the heirs of the bodies of both of them ; and he observes, “ there is no remainder in the feme, for the freehold is limited to her alone ; and as the person who is to take in remainder must be heir of both their bodies, the estate arising from the limitation to the heirs cannot be involved or flow into the limitation to the feme herself, the gift not being confined to her own heirs.”

And he afterwards remarks (u), “ That though every person may so far be supposed to carry his own heirs in himself during his life, as that a limitation to him where he takes a

(t) *Fearne*, (4 edit.) 44, 85, cites 2 R. A. 417; H. Pl. 1, 2; Dy. 64, 99; *Lane v. Pannel*, 1 Leon. 102; *Frogmorton v. Wharrey*, *Fearne*, 85; 3 Wils. 125, 144; 2 B. Com. 728; *Denn v. Gillett*, 2 Term Rep. 431.

(u) 2 *Fearne*, 4 ed. 45; 1 Inst. 22 b.

preceding freehold may vest in himself; yet no person can be supposed to include in himself the heirs, &c. of himself and of somebody else.

Let it be remembered, that in *wills*, that strictness of the law which, in regard to *deeds*, requires that the limitation shall be to the *heirs* by that word, and not by a circuitous expression, (except in the cases of a gift in *frankmarriage*, and of cases of direct and immediate reference;) and that these heirs shall, in the case of limitations in tail, be designed by words of procreation, descriptive of the body from which the heirs are to issue, or the person by whom they are to be begotten; is relaxed.

In *Roe v. Quartley* (x), a devise was by way of remainder to the right heirs of *Walter Read* and *Mary* his wife, for ever, and the Court observed, "It has been argued, that this description of the right heirs of *Walter* and *Mary* must either mean the *heirs* of the *survivor*, or else it must mean to give an estate in *moieties* to the *heirs of each*; and if so, the plaintiff can only be entitled to a moiety. But we are of opinion, that the heirs of *Hester*, [which heirs, claimed as being the heirs of the marriage of *Walter* and *Mary*, in opposition to a brother of *Hester*, and heir of *Mary*, being her son by a second husband] ought to take the whole." The Court observed, "we think that it may plainly be collected from the will that such was the testator's intention, which ought in all places to govern, if not contrary to any rule of law. His

(x) 1 Term Rep. 630.

bounty seems to be confined to the children of *Walter* and *Mary*; he first entailed it upon *Hester* and her issue; then he devised it to the child *Mary* might be the *ensient* with, in tail; and then he limited the remainder in fee to *their heirs*. Now, it is impossible that any person can answer the description of *heir to both*, unless he be a *child of both*, and such construction should be put upon a will, if it may be, as will fully satisfy the words; and the words here are satisfied, if they be taken to mean the children of both of them." They added, "It is to be collected from the passage cited from *Co. Litt.* 187, *a*, that a grant to husband and wife is not considered in the same light as a grant to other persons; for if a joint estate be made to husband and wife, and a third person, in this case the husband and wife have, in law, in their right, but the moiety, and the third person shall have as much as the husband and wife; for the husband and wife are but one person in law." And, "So, if made to a husband and wife and two others, in this case the husband and wife shall have but a third. If then they are but as *one person*, by reason of the relation they stand in, when a limitation is made to their heirs without any prior estate limited to them, it must, most naturally, mean heirs to *them both*, according to that relation, which can only be *children of them both*. Therefore, we think the lessors of

the plaintiff are entitled to recover the whole under this ejectment."

Though in construing wills, the words which in a deed would create an estate-tail, will give a like estate, this rule does not apply when reversed; for words which *in a deed* pass an estate in fee, and again, words which *in a deed*, give only an estate for life, may, in a will, pass an estate-tail.

Thus, a feoffment to a man and his heirs-male, without any context, conveys an estate in fee (*x*). In this case, the word male is rejected as surplusage (*y*). In a will, the word *males* will be retained, and a devise in these words will pass an estate-tail; for the law in favour to the intention of the testator will supply the words of the body (*z*). So if a feoffment be to a man and his heirs, and if he shall die without issue (*a*), (giving no direction that the *issue* shall be of his body,) then over, the feoffee will have an estate in fee. In a devise by these words, the devisee will have an estate-tail.

It is otherwise, when the limitation over is if the devisee and another person die without issue.

Again, it is not clear that a feoffment to a man and his heirs, and if he shall die without heirs, to a kinsman of the whole blood, who

(*x*) *Abraham v. Twigg*, *Cro. Eliz.* 478.

(*y*) 11 H. VI. 13 a; 1 P. Wms. 77.

(*z*) 1 Inst. 27 a; *Ld. Ossulton's Case*, 3 Salk. 336.

(*a*) *Scrape v. Rhodes*, 2 Com. Rep. 541.

may succeed to him as his heir, will qualify the words of limitation to the heirs to mean heirs of the body. In a will, such an expression will certainly have this effect.

A series of cases to this point will be cited, in considering one of the classes of limitations of estate-tail, by will; and to the reader a great variety of other instances will occur in the perusal of this Essay; and numerous are the examples of this sort which the student will find in the abridgments and books of reports.

Again, a gift by deed to a man and *his seed* (b), without any limitation to the heirs, passes an estate for life only, for want of words to extend the limitation to the heirs by that name. In wills, however, a devise in these terms will pass an estate-tail.

Even in *deeds*, as has been already noticed, the word *heir* in the singular number, coupled with words of procreation, will create an entail. Of course, the same construction has place in wills; and in wills, with an allowance of greater liberality to the testator's intention. For the word *heir* in the singular number has frequently been held to pass an estate in tail general, and to embrace all the issue of the devisee, of the given description.

The following cases are instances directly in point:

(b) 1 Inst. 20 b.

In *Whiting v. Wilkins* (c), a devise was to *R.* one of the testator's sons for ever; and after his death to the *heirs-male* of his body for ever; and in default of such heir-male, to the other of the testator's sons, and it was held that *R.* took an estate-tail.

So in *Pausey and Lowdall* (d), (a case on a surrender of copyhold lands to the use of a will), the testator devised to *B.* for life, remainder to his heir of his body begotten for ever, and it was held that *B.* had an estate-tail.

And in *Burley's Case* (e), a devise was to *A.* for life, remainder to the next heir-male, and for default of such heir-male, then to others in remainder; and the opinion of the Court of King's Bench was, that *A.* had an estate-tail; and they determined accordingly.

And again, in *Richards v. Lady Bergavenny* (f), a devise to *B.*, and such heir of her body as should be living at the time of her death, and the gift passed, in default of such remainder over, an entail.

In *Dubber ex. dem. Trollope v. Trollope*; or *Trollope v. Trollope* (g), the testator devised to his eldest son *William Trollope* for life, remainder to his first son for life, remainder to the

(c) 1 Bulst. 219; 1 Roll. A. 836.

(d) 2 R. A. 794; Styles, 244, 273.

(e) Cited by Hale, 1 Vent. 230; and see *Miller v. Seagrave*; 2 Eq. Ca. Abr. 318, c. 33.

(f) 2 Vern. 324. (g) Ambl. 453. 8 Vin. Abr. 234.

right heirs-male of his body lawfully begotten, remainder to his second, third, fourth, fifth, sixth and seventh sons of the body of *William*, and the heirs-male of their bodies lawfully begotten, and for want of such issue, to his son *Thomas Trollope* for life, and after to the heir-male of his body lawfully begotten, and for want of such heir-male to be and remain with his son *Christopher Trollope*, and the first son of his body lawfully begotten, and for want of such issue to be and remain to his fourth son *James Trollope*, and the heirs-male of his body lawfully begotten, and so to the first, second, third, fourth, fifth, sixth, seventh, and the heirs-male of their bodies ; and for want of such issue, then to remain and be to his fifth son *Matthew Trollope*, and the heirs-male of his body lawfully begotten, and so to the first, second, third, fourth, fifth, sixth and seventh son, and for want of such issue, to remain to the right heirs of Sir *Thomas Trollope* for ever.

The question being between the heirs-male of *Thomas Trollope*, second son of Sir *Thomas Trollope*, the testator (in which branch of the family the estate has been all along enjoyed), and the heir-male of *Matthew*, the fifth son, who was the lessor of the plaintiff.

The title *Matthew* made was under the remainder limited to *Matthew*, the fifth son, supposing that it had taken effect ; because three of the remainders were spent by death

without issue ; and the other was not subsisting, because as it was agreed the limitation to *Thomas* the second son did not create an estate-tail, and was no more than an estate for life to him, and afterwards to his first heir-male for life ; which estates were determined by his death, and by the death of his first heir-male, who was the defendant's father ; and, consequently, as it was contended, the remainder to *Matthew* the fifth son and the heirs of his body must take effect in the plaintiff, who was his heir-male.

So that the question arose upon the limitation to *Thomas Trollope*, the second son of the testator, to whom the estate was appointed to remain in these words : "*To my son Thomas Trollope for the term of his natural life, and after to the first heir-male of his body lawfully begotten ; and for want of such heir-male to be and remain to Christopher,*" &c.

The Court of Common Pleas declared they were all of opinion, that by virtue of this limitation *Thomas Trollope* became seised in tail to him and the heirs-male of his body begotten ; and consequently the defendant must be entitled as heir-male of the body of *Thomas Trollope*, his grandfather. And to make this clear and evident, the Chief Justice *Eyre*, who delivered the judgment, observed, " It may be proper to divide the question, and to consider every part of it separately and distinctly.

" 1st. I would first consider it as a devise to a man ; and the heir-male of his body

in the singular number ; and what effect such a devise will have:

“ 2dly. Whether a devise of an express estate for life to the first devisee previous to the limitation to the heir-male, will at all vary the case from a plain devise to him and the heir-male, without any such previous limitation for life:

“ 3dly. Whether the word *first* being inserted before the words *heir-male*, which makes it a devise to *Thomas Trollope*, and after to the first heir-male of his body begotten, will make any alteration in the case:

“ 4thly. What effect the last words, *and “for want of such heir-male,”* in the subsequent limitation will have? and how far they will influence the precedent limitation to *Thomas*, in making it either an estate for life or in tail?

“ And from the consideration of these four points it will clearly appear that the devise to *Thomas Trollope* for life, and after to the first heir-male of his body lawfully begotten, and for want of such heir-male, to be and remain with another person, will give the first devisee an estate-tail.

“ I shall consider these points in their order, and begin with that which was first mentioned, viz.

“ 1st. What effect a devise to a man and the heir-male of his body will have? and

whether it will give the devisee an estate for life or in tail?

“How this matter would have stood if the limitation had been in a *deed*, is not our affair at present to determine, because we are now upon the construction of a will.

“But since the reasoning upon the words “*heir-male*,” in the singular number, in the case of a *deed*, hath been thought proper and of weight in the case of a will, it will be necessary to take notice of the books which have been cited in the case of a deed.

“Now it has been insisted upon from the first section of *Littleton*, and *Coke*’s comment upon it, “that the word “*heirs*” in the plural, is absolutely necessary to create an estate of inheritance; and *Littleton*, section one, says, “That the word “*heirs*” only can make an inheritance in all feoffments and grants.” And *Coke*, (1st. *Inst.* 8 b.) says, “That every word of *Littleton* is worthy of observation, as “*heirs*” in the plural number; for if a man give land to a man and his “*heir*” in the singular number, he hath but an estate for life; for his “*heir*” cannot take a fee-simple by descent, because he is but one, and therefore in that case his heir shall take nothing.

“But this seems to be answered even in this book, 1 *Inst.* fol. 20, where it is said, “That though *Littleton* saith *heirs*, yet *heir* in the singular number, in a special case, may create an estate-tail, as appears by 39 *Ass.* 20. 1 *Inst.*


22," where *Coke* says, 'That of all the estates-tail most coercted and restrained that I find in our books is, the estate-tail, 39 *Ass.* 20, where lands were given to a man and to his wife, and to one heir of their bodies lawfully begotten, and to one heir of that heir only, which he agrees to be an estate-tail;' which seems to contradict his former opinion in a stronger instance than he had before put. The former instance was a gift to a man and his heir-male in the singular number; and however it may be construed to give the estate a descendible quality to every heir one after another, when there is nothing particular to restrain it to one heir only, yet, when it is limited after the decease of the grantee or donee, as in 39 *Ass.* 20, to the first and second heir only, it is a plain declaration of the donor that it shall go no farther, and in such a restriction as seems to deprive it of the quality which is the true description of an estate of inheritance, viz. that it is an estate descendible to all generations, and, therefore, this of 39 *Ass.* 20, can never be an estate-tail, unless a grant to a man and one heir-male, or a grant to a man and his heir-male in the singular number will make it so.

And, therefore, one would think that the words *heir-male* in the singular number, should give the estate a descendible quality, and make it inheritable.

[This seems to be an inaccurate conclusion. See *supra*, 397.]

“ And it does not appear that *Littleton* ever intended to say otherwise ; for he was not considering whether the word *heir* in the singular number was equivalent to *heirs* in the plural ; and was only saying, that the words “ for ever ” alone, as a grant to a man “ for ever ” would [read not] create an inheritable estate ; for it must be said *who* shall take and enjoy this estate “ *for ever* ” ? And to establish this as a rule of law, he says, that the word “ *heirs* ” only can make an estate of inheritance in feoffments and grants : and one can hardly suppose that the case of the word “ *heir* ” in the singular number was then thought of, or that he intended to say that it should not be taken collectively, and should mean but one heir only. And the reason given by Lord Coke, 1 *Inst.* 8 b. that the heir should take nothing because he was *but one*, is by no means convincing, and can never hold, when it is considered that there can be but one heir at one time ; for heirs are to take one after another, in a course of descent ; and there can be but one heir at once. And there is also a considerable authority, *Reg. Jud.* 6, to this purpose, where there is a *sci. fa.* brought by an issue-male to execute a fine of lands granted to his father, and *hæredi masculo de corpore suo procreato* ; and there is no resolution of any book or court to the contrary, except in *Shelley's Case*, 104, which was only *arguendo*.

But, however, it may stand upon a feoffment



or grant, yet it can never be imagined that the word *heirs* is necessary to make an estate of inheritance in the case of a devise. Coke says expressly (1 *Inst.* 9 b), that a devise to a man *in perpetuum*, or in fee, or to him and *sanguini suo*, or *semini suo*, will make an estate of inheritance by the intention of the testator; and it is as reasonable to infer that the testator intended to give an estate-tail by the limitation to the father for life, and afterwards to his heir-male; for it is plain he intended to give a descendible estate that should go from the ancestor to the heir; an estate that may be inherited; and, therefore, it may reasonably be intended that he designed an estate-tail; an estate inheritable by the heir-male of his body. And it is so declared in the case of *Clerk v. Day*, (*Cro. Eliz.* 313,) where it is said to be agreed by all the justices, that a devise to a man and the heir of his body is an estate-tail, and shall go to all the heirs of his body; for *heir* is *nomen collectivum*; and one can have but one heir at one time, and this shall go from heir to heir.

“This was an opinion they all agreed in, though they differed in the principal point, which was a devise to a daughter for a term of her life; and if she *marry, and have any heir of her body lawfully* begotten, then that heir after her decease should have the land, and *the heir of their bodies* lawfully begotten; and if the daughter did die without issue, the remainder over.

“ The fact was, that the daughter married, but died, leaving issue, who enfeoffs the lessor ; and he brought an ejectment against the husband, who claimed as tenant by the curtesy ; and the question was, whether the devise to the daughter gave her an estate-tail executed ? or whether she had an estate for life only ?

“ This case is reported in several books, *viz.* *Cro. Eliz.* 313 ; 1 *Roll. Abr.* 832, 839 ; 2 *Roll. Abr.* 417 ; *Moor*, 593 ; *Owen*, 148 ; but in different manners, in regard to the opinion of the Court ; and therefore has been cited on both sides of the question, but is of no authority on either, for it never was resolved : and this appears by the record, which is entered *Hil. 35 Eliz. Rot.* 467, B. R. by the name of *Clerk v. Day*. It is stated in *Cro. Eliz.* according to the record, but no judgment was ever given in it.

“ 2 *Jon.* 111, 113. *Gould v. Goddard*, devise to a man for life, and afterwards to *his next heir-male*, and for default of such issue, remainder over, is said and resolved to be of the same sense with *heirs-male*. 1 *Bulstr.* 219, 1 *Roll. Abr.* 836, *Whiting v. Wilkins*. If a man devise land to R. his younger son, for ever, and after his death to the *heir-male of his body, for ever*, with divers remainders over, by this devise R. has an estate-tail, and not an estate in fee, which is made by the words *heir-male* in the singular number only.

“ Another case is in *Styles*, 249 ; 1 *Ro. Abr.*

627, *Pawsey v. Lowdall*. The words of the book are, "If *A.* seised of a copyhold in fee, surrender it to the use of his will, and afterwards by his will deviseth it to *B.* his cousin, for his life, and after his death to the heir of his body begotten, for ever, in this case the word *heir* being limited to the body of *B.* is *nomen collectivum*, and all one with the word *heirs*; and the words *for ever*, which in a devise makes a fee, are only put to show his intention, as usual, when land is given to one and his heirs for ever; and therefore in this case it is a fee executed in *B.*; and his heirs are in by descent, and not by purchase. And this is not like to *Archer's Case*, 1 *Co.* where the devise was to one for life, and after to *his heir-male*, and to the heirs-male of such heir-male; for there the inheritance is limited to the heirs of the body of such heir-male, which shows that the words *for ever* were not made use of as a reason to help out the words *heir-male* in the singular number, which was offered as an answer to these last cases.

"There are cases indeed where a devise to the father for life, and after to his *next heir-male*, and to the heirs-male of *such next heir-male*, has been held to be only an estate for life in the father, with a remainder in tail to the next heir-male; which are certainly right; but the reason is, because the inheritance is expressly limited to the heirs-male of such heir-male. It is not [omit not] a devise to a man and his

heir-male, and the heirs-male of such heir-male, which shows that the words *heirs-male*, being the words which first limit the entail, are grafted upon the words *heir-male*, and operate as a *designatio personæ*, and prevent the operation of them as words of limitation upon the estate limited to the father, which was *Archer's Case*, 1 Co. 66; *Cro. Eliz.* 45; 2 *And.* 37, for that was a devise to *Robert Archer*, the father, for life, and afterwards to the next heir-male of *Robert*, and to the heirs-male of the body of such next heir-male; in which case it was held that *Robert* had an estate for life, because he had an express estate for life devised to him, and the remainder is limited to the next heir-male in the singular number, and to the heirs-male of such heir-male, which shows plainly that the father is not to take an estate of inheritance, for the devisor has not limited the estate to his heirs-male, but to the heirs-male of his heir-male.

“ It must be confessed, that the devise of the express estate for life, the remainder to the next heir-male in the singular number, is said in the report of *Archer's Case* to be the reason why the Court adjudged it an estate for life.

“ But in no case since that time has it been considered or understood as a resolution upon that single ground; but the subsequent limitation to the heirs-male of such heir-male has been looked upon as the true foundation of that resolution.

"It is said by *Hale*, 1 *Vent.* 215, that a devise to one for life, and after his decease to his heir, hath been held a fee; for *heir* is *nomen collectivum*. But *Archer's Case*, says he, is a devise to *A.* for his life, and after to his heir, and to the heirs of such heir; in which case, he says, that because the words of limitation were put to the word *heir*, therefore, *heir* was taken to be *designatio personæ*, and resolved that he should take by purchase. And upon the same foot is this case of *Archer* treated, 1 *Ro. Abr.* 627, in *Bowey* [read *Pawsey*] v. *Lowdall*, and *Style*, 249.

"And if a devise to a man and his heir-male in the singular number, will have the same effect as a devise to a man and his heirs-male, in the plural, there can be no question upon the second point.

"Point second: Whether a devise of an express estate for life, before the limitation to the heir-male, will prevent the effect of that limitation?

"For whenever an estate for life is given, with a remainder to the heirs, or the heir of the body of the grantee, it will be an estate of inheritance executed in the grantee; for when there is an estate of freehold limited to the ancestor, no subsequent limitation to his heirs, or the heirs of his body, can make them purchasers, but the grantee will be seised in fee according to the subsequent limitation, though the first estate limited to him was an estate for

life granted by express words; and therefore if heir-male in the singular number will have the same effect with heirs-male in the plural, an express estate for life limited to the grantee will be of as little consequence in one case as the other.

“ The case of *King v. Melling*, 1 *Vent.* 214, is a case in point ; for in that case there was an express estate for life devised ; for the land was devised to *Bernard* for and during his natural life, and after his death to *such issue* as he should have of the body of his second wife.

“ Point third : The next question will be, Whether a devise to a man for life, and afterwards to his *first* heir-male, will be a *different* estate from a devise to a man for life, and afterwards to his heir-male, without the word *first* ? and whether the inserting the word *first* makes any alteration in the case ?

“ Now, we are all of opinion, that a devise to a man and his *first* heir-male (*h*) can have no other effect than a devise to him and *his heir-male* in the singular number without the word *first*; for the heir-male, and the first heir-male must necessarily be the same person (*i*); for the heir-male must be the immediate heir-male, and consequently the first heir-male.

“ A devise to a man for life, and afterwards to *his first son*, would have given a remainder which would have vested in the first son in the life-

(*h*) *Minshall v. Minshall* in Ch. 11 G. 2, MS.

(*i*) *V. Lovelace v. Lovelace*, Cro. El. 40, on word *eldest*.

time of his father, but a devise to the first heir-male could not take effect till after the death of the father, when the heir-male, and the first heir-male, must be the same person; and therefore the word *first* can make no alteration in this case; but the same naked question will still remain, Whether a devise to a man for life, and afterwards to the heir male of his body in the singular number, will create an estate-tail? And the case of *Lovelace v. Lovelace*, Cro. Eliz. 40, which has been cited on the other side of the argument, is not to the contrary; for that was a devise to a man and *his eldest issue male*, he having no son at that time; and it was adjudged no estate-tail, but for life only; for a man may have many issues, one, two, three; and therefore when there is a devise to him and his eldest issue, it is a description of the person particularly designed to take, and shall go no farther than the person only. But the cases of first or eldest *issue*, and the first or eldest *heir*, are very different; for a man can have but one heir at a time; and therefore if the devise be to him and his eldest heir, or first heir, the case will be the same as if the devise had been to him and his heirs generally (*k*).

“Point fourth: But supposing that a devise to a man for life, and after to the heir-male of his body, will not create an estate-tail, yet the

(*k*) Cro. Eliz. 40.

subsequent words, which are, “and for want of such heir-male to be and remain with *Christopher*,” &c. will effectually do it.

“For that such heir-male must be the heir-male of *Thomas*, as the first devisee, for the devise is to *Thomas Trollope*, and after to the first heir of his body lawfully begotten, and for want of such heir-male, the remainder over.

“So that the case is no more than if a devise had been made to a man for life, and if he died *without heir-male*, the remainder over, which would certainly make an estate-tail; for if he died without any heir-male, he certainly died without a first heir-male; and if he died without a first heir-male, he died without any; and the words *for want of such issue* will make an estate-tail by implication, according to *Robinson's Case*, 4 Jac. 1 Vent. 230, and was a devise to *A.* for life, *and if he died without issue*, the remainder over, *A.* took an estate-tail; and there are many other cases to the same effect.

“And there is a very strong case to this purpose, *Hil.* 42 and 43 *Eliz.* cited by *Hale*, 1 Vent. 231, by the name of *Byfield's Case*, which was a devise to *A.*, and if he died, not having a son, then to remain to the heirs of the testator, which was held to be an estate-tail. (*ka*)

“And *Burley's Case*, 43 *Eliz.* cited by *Hale*, 1 Vent. 230, is a case in point; for there was

(*ka*) *Mellish v. Mellish*, 2 Barn. & Cres. 520.

a devise to *A.* for life, remainder to the next heir-male, and for default of such heir-male to remain over, adjudged an estate-tail. For when it is said, that for want of such issue the land shall remain over, it is plainly meant, that it shall not remain over till the issue failed; and the issue must have it so long (for nobody else can); and so it is an estate-tail.

“And therefore, since a devise to a man for life, and after to the first heir-male of his body lawfully begotten, and for want of such heir-male, to another, will raise an estate-tail in the devisee, judgment must be given for the defendant, who claims as heir-male under such a limitation.”

This judgment was affirmed in the King's Bench unanimously, on a writ of error; and its importance as a leading case, illustrating a general rule, and examining the authorities, was supposed to justify its insertion in detail.

In all these and the like cases, the Courts proceed in their determination, on the presumption that the intention was to create an entail, and that by the word heir the testator meant his heir for the time being of his body; consequently to include all the lineal descendants (*l*).

But there are several instances which so far from affording ground for this construction have precluded it by exhibiting evidence of a different intention.

(*l*) *Burnet v. Coly*, Barnardiston's Rep. in B. R. 367. 8 Vin. Abr. 258.

Thus, in *White v. Collins* (m), a devise was to *F.* to enjoy the rents and profits thereof for his natural life, with a power to make a jointure of all, or part, if he should marry; and after his death, and subject to the jointure, if any should be made, to the heir-male of his body lawfully begotten, during the term of *his natural life*; and for want of such heir-male, then over; and it was held, that *F.* and the person who should at his death be his heir-male had, severally, distinct estates for life only. An estate-tail could not arise to *F.* from the devise to his heir, since the estate limited to the heir was confined to the period of the life of the heir, and the heir-male could not have a more ample estate than for his life, because it was confined to that express period; and there were not any words to show that the estate was to be inheritable in succession beyond the express period of a life.

In this case, too, it was agreed, that had nothing appeared to warrant a contrary inference, *F.* might have taken an estate-tail though the devise to his heir was in the singular number.

It is also observable, that the gift was only to the heir in the first degree, and not to successive heirs, so as to pass a qualified estate-tail.

In other instances (n), the word heir in the singular number has, from words of appropriated

(m) *White v. Collins*, Com. Rep. 289.

(n) *Archer's Case*, 1 Co. 66 b. *supra*, p. 548.

reference, which designated some particular person, or from words of superadded limitation, which described a line of successors to claim under an entail in that person, been construed a word of purchase; and these cases are collected in the first volume.

However, the word *first, next, or eldest* (c), coupled with the word *heir*, will not of itself prevent the construction which would raise an estate-tail. To raise such estate there must be some words of reference to a person *who is living*; or some superadded words of limitation describing a class of inheritable persons, who are to be the representatives and legal successors of the heir only, and not of his ancestor.

(c) 1 Vol. p. *supra*, 548.

END OF VOL. II.

The following Works will be found to present one continued Series of the Digests of Reports from the earliest to the latest Period.

Just Published, in 2 large vols. royal 8vo.

AN ANALYTICAL DIGESTED INDEX to the COMMON LAW REPORTS, from the time of Henry III. to the commencement of the Reign of George III.; with Tables of the Titles and Names of Cases. By THOMAS COVENTRY, Esq. of Lincoln's Inn, Barrister at Law, and SAMUEL HUGHES, Esq. of the Inner Temple.

List of Reports from which this Digest has been compiled :

Aleyn,	Fortescue,	Noy,
Anderson,	Foster,	Owen,
Andrews,	Freeman,	Palmer,
Barnardiston,	Gilbert,	Parker,
Barnes,	Godbolt,	Plowden,
Bendloe,	Goldsborough,	Pollexfen,
Benloe and Dalison,	Hardres,	Popham,
Blackstone, Sir Wm.	Hetley,	Practical Cases in K. B.
Bridgman, J.	Hobart,	Raymond, Ld.
Bridgman, Orl.	Holt,	Raymond, T.
Brownlow and Goldes-	Hutton,	Ridgeway,
borough,	Jenkins,	Rolle,
Bulstrode,	Jones,	Salkeld,
Bunbury,	Jones, Sir Wm.	Saunders,
Burrow,	Keble,	Saville,
Burrow's Settlement Cases,	Keilwey,	Sayer,
Carter,	Kelyng, J.	Showers,
Carthew,	Kelynge, Sir Wm.	Siderfin,
Cases temp. Hardwicke,	Kenyon.	Skinner,
Cases of Practice in C. P.	Latch,	Strange,
Clayton,	Leonard,	Styles,
Coke,	Levinz,	Vaughan,
Comberbach,	Ley,	Ventris,
Comyns,	Lilly,	Willes,
Croke,	Littleton,	Wilson,
Davies,	Lutwyche,	Winch,
Dyer,	Murch,	Year Books,
Fitzgibbon,	Modern,	Yelverton.
Foley,	Moore,	

In 2 large vols. royal 8vo.

A DIGESTED INDEX to the TERM REPORTS, and others, analytically arranged ; containing all the points of Law argued and determined in the Courts of King's Bench, Common Pleas, and Exchequer, during the Reign of George III. to the eighth year of George IV. contained in the Reports of

Anstruther,	Cowper,	Maule and Selwyn,
H. Blackstone,	Douglas,	McClelland,
W. Blackstone,	Dowling and Ryland,	Moore,
Bosanquet and Puller,	Durnford and East,	New Reports,
Barnewall and Alderson,	East,	Price,
Barnewall and Cresswell,	Forrest,	Smith,
Broderip and Bingham,	Kenyon,	Taunton,
Burrow,	Loft,	Wightwick, and
Chitty,	Marshall,	Wilson ;

With Tables of Reference, &c. ; containing the substance of above one hundred volumes ; Second Edit. considerably improved and enlarged, and brought down to the year 1827. By ANTHONY HAMMOND, Esq. of the Inner Temple.

ANNUAL LAW DIGEST (1826.)

In royal 8vo. price 9s.

AN ANALYTICAL DIGEST of the REPORTS of CASES decided in the Courts of King's Bench and Common Pleas, and Exchequer, in Chancery, at the Rolls, and in the Vice-Chancellor's Court ; in Parliament, in the Consistory Court, Arches Court, Prerogative and Peculiars, and in Bankruptcy, Nisi Prius and Crown Cases, decided in the year 1826 ; continued annually. By HENRY JEREMY, Esq. Barrister at Law.

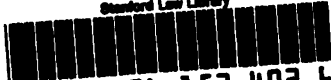
This Work, on perusal, will be found of great value, as it embraces all the decisions of the different Courts that arise in the course of the preceding year ; and, from the circumstance of being published annually, affords a ready reference to all the points decided during that period.

and Series
Period.

REPORTS
III; with
Lincoln.

7

Stanford Law Library



3 6105 06 152 402 6